Golden State Warriors *and* Concession Vendors Union Local 468 a/w Graphic Communications International Union, AFL–CIO. Case 32–CA–16655

July 19, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN AND MEMBERS LIEBMAN AND TRUESDALE

On February 5, 1999, Administrative Law Timothy D. Nelson issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this matter to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions, as further discussed below, and to adopt the recommended Order.

We affirm the judge's finding that the Respondent's temporary, one-season shutdown of its vending operations during the planned renovation of the Oakland Coliseum Arena (the Arena) did not extinguish its preexisting 9(a) collective-bargaining relationship with the Union representing a unit of the Respondent's seasonal vendors. We therefore affirm the judge's conclusion that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing established vendor recall procedures and compensation methods, and by failing and refusing to recognize or bargain with the Union upon resumption of vending operations at the Arena. We also affirm the judge's conclusion that the Respondent violated Section 8(a)(3) and (1) of the Act by failing to recall former vendors in accord with past practice, for fear that the Union would make exorbitant compensation demands.

The Respondent, Golden State Warriors (the Warriors), is a professional basketball team franchised by the National Basketball Association. It has been owned for the past 20 years by at least three different persons or entities. The current owner, the Cohan partnership, acquired the team in January 1995. Over the 20 years leading up to the 1996–1997 season, the Warriors played their home games at the Arena from approximately November to May. At all material times, the Warriors have controlled vendor operations for those games. A quasi-public entity, Oakland-Alameda County Coliseum, Inc. (Coliseum) controlled vendor operations for other events at the Arena and at the outdoor Coliseum Stadium.

In a collective-bargaining agreement effective by its terms from September 1, 1995, to August 31, 1996, the Warriors recognized the Union as the exclusive agent of employees selling programs and novelties at the Arena during Warriors' home games. In the brief agreement, the parties memorialized terms and conditions of employment, including a commission-based compensation method. The agreement did not refer to seasonal recall procedures.

The General Counsel's witnesses, Bob Jacobs, Donald Gohlke, and Dennis Danziger, credibly testified that they and other vendors had sold programs and concessions at Warriors' games at the Arena each season for over a decade. They further testified that they worked under the Respondent's supervision, sold the Respondent's wares, and were paid by the Respondent. During their years of work, the Respondent consistently employed a regular cadre of vendors. Many of these vendors worked at other Bay Area sports and entertainment sites both during and between the Warriors' annual seasons.

The method for seasonal layoff and recall of this vendor group was informal and undocumented. Prior to the start of each Warriors' season, the Respondent's merchandise manager would initiate contacts with past season vendors and invite them to a kickoff luncheon on the day of the first exhibition game. At that event, the manager would review merchandise, prices, and procedures with the vendors, who would then collect the inventory for sale at their portable vending stands. After the final game of each season, the vendors would return their portable stands and unsold inventory to storage, meet with the manager to receive their split of the commission-based sales proceeds, and disperse.

The historical recall and layoff pattern continued unchanged during the 1995–1996 season when the parties' collective-bargaining agreement was in effect. After that basketball season and throughout the 1996–1997 season, the Arena was closed for extensive renovations. As planned and widely publicized in advance of the temporary closure, the Warriors played their home games for one season 50 miles away in the San Jose Arena. They returned to play at the Arena when it reopened on schedule in fall 1997. A subcontractor whose employees were represented by another union handled vendor operations for the Warriors' games played at the San Jose Arena.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products,* 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Union did not seek to bargain with the Respondent concerning the temporary shutdown at the Arena and did not seek to negotiate a successor agreement until the summer of 1997.[3] Union Business Agent John Arnolfo credibly testified that he sent a letter to the Respondent's agent, Larry Hausen, on July 14 and another to the Respondent's attorney, Robin Baggett, on August 13 notifying them that the Union represented the vendors, and requesting that the Respondent contact the Union to discuss a successor agreement. Arnolfo did not receive a response to either letter.

Baggett and Arnolfo spoke briefly by phone in late August or early September. They primarily discussed ongoing negotiations between the Respondent and Coliseum officials about the Respondent's interest in managing services for all Arena events. The judge credited Baggett's testimony that, although he may have agreed to keep Arnolfo apprised of the negotiations with Arena officials, he did not agree to get back to Arnolfo about scheduling collective bargaining. In fact, Baggett did not thereafter get back to Arnolfo at all.

Vendor Jacobs credibly testified that in late August he asked Respondent's new merchandise manager, Aaron Brady, if the vendors would be coming back to the Arena. Brady told Jacobs that the vendors would not be coming back because the Union had asked for an "outrageous sum of 35 percent" commission. It is undisputed that Brady mistakenly believed that the Union had made such a demand. Jacobs reported Brady's comment to Arnolfo, and also reported that Brady said the Respondent would be hiring vendors at $10 per hour plus a bonus.

Arnolfo sent another letter to Baggett on October 18, requesting that the "false rumors" be addressed concerning the 35–percent commission and the hiring of new vendors at $10 per hour, and repeating his request to commence collective bargaining. This letter triggered a reply from Respondent's labor attorney, Kent Jonas, dated October 23, 1997. Referring first to the plans for the Warriors, through a subsidiary company, to manage all Arena services, Jonas acknowledged that this operational change would not take effect until at least January 1, 1998, and that there was not yet any final agreement on this subject. (In fact, there was still no agreement by the close of the unfair labor practice hearing over a year later.) Jonas then informed the Union that the Respondent had already begun recruiting new employees, that it did not believe it was required, or even permitted, to bargain with the Union, which had not had a contract for over 1 year and which did not represent any vendors working at the Arena at that time, and that the Respondent would consider the applications of any individuals who formerly worked at the Arena. Jonas included Brady's name and phone number for individual employees to contact about applying for jobs.

Meanwhile, beginning in early October, the Respondent recruited vendors from about 30 different local organizations, but it did not recruit from the Union. The Respondent hired 22–24 new recruits effective November 1, 1997, and hired several more vendors during the 1997–1998 season. No past-season vendors applied for jobs after the Union received belated notice of the new hiring procedures.

Certain well-established legal presumptions arise from the Respondent's 1995 recognition of the Union as the exclusive bargaining representative, within the meaning of Section 9(a) of the Act, for a unit of vendors working Warriors' games at the Arena. See generally *Auciello Iron Works, Inc. v. NLRB*, 517 U.S. 781, 785–790 (1996). Of particular relevance here is the rebuttable presumption that the Union continued to enjoy majority support in the Warriors' vendors unit even after the expiration of the parties' 1995–1996 collective-bargaining agreement. *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 778 (1990).

Furthermore, it is equally well established that, for as long as the Union remained a 9(a) representative of the vendors unit after the contract's expiration, the Respondent had a duty not to effect unilateral changes in unit employees' existing terms and conditions of employment without first bargaining to impasse with the Union about the proposed changes. *NLRB v. Katz*, 369 U.S. 736 (1962). This proscription against unilateral action applies not only to mandatory bargaining subjects that were specifically covered in the expired contract, but also to "an activity which has been 'satisfactorily established' by practice or custom; an 'established practice'; an 'established condition of employment' . . . [or] a 'longstanding practice.'" *Exxon Shipping Co.*, 291 NLRB 489, 493 (1988) (citations omitted).[4] Frequently, a particular activity becomes a mandatory subject as the result of a practice that begins before a collective-bargaining relationship is established. E.g., *McDonnell Douglas Aerospace Services Co.*, 326 NLRB 1391, 1394–1397 (1998).

In this case, the parties' 1995–1996 collective-bargaining agreement contained no provisions for the layoff and recall of unit vendors. The credited testimony of the General Counsel's vendor witnesses clearly established, however, that in the several years preceding the

[3] All subsequent dates are in 1997, unless otherwise stated.

[4] See also, e.g., *Posadas de Puerto Rico Associates, Inc. v. NLRB*, 243 F.3d 87 (1st Cir. 2001), enfg. 330 NLRB 691 (2000), and *Dow Jones & Co.*, 318 NLRB 574, 576 (1995).

Respondent's formal recognition of the Union's 9(a) representative status there was an established pattern by which the Respondent reemployed and laid off a regular cadre of vendors for each Warriors' season. This pattern had become an established condition of employment and, regardless of whether the 1995–1996 collective-bargaining agreement referred to it, the Respondent was obligated to bargain with the Union prior to making any changes in it. In fact, both the recall and layoff of vendors for the Warriors season covered by the contract adhered to the established practice. Those vendors who worked during the 1995–1996 season had a reasonable expectancy of recall by the same procedures for the next season to be played at the Arena.[5]

The Respondent and our dissenting colleague contest the judge's conclusion that the Respondent violated Section 8(a)(5) by unilaterally changing hiring and commission procedures and by refusing to recognize the Union as the vendors' bargaining representative upon resumption of Warriors' games at the Arena in 1997. Their position is inconsistent with the bargaining obligations established by the precedent just discussed.[6]

In particular, we reject the notion that the Respondent's conduct can be excused by the Union's failure to request bargaining about the layoff of vendors at the end of the 1995–1996 season or to request bargaining about a new collective-bargaining agreement until the summer prior to the Warriors' scheduled return to the Arena. There was no apparent need, much less an obligation, for the Union to request bargaining. Layoffs were a regular, recurring part of the seasonal pattern of employment for the Respondent's vendors. As previously stated, an established past practice of reemployment gave them a reasonable expectation of recall. Under the *Katz* doctrine, it was *the Respondent's* statutory obligation to give the Union notice and an opportunity to bargain about any proposed changes in this established past practice. The Respondent gave no such notice. It only announced that while the Arena was closed for a finite period of renovation, the Warriors would play their games in San Jose. When renovations were completed, at a time projected to be prior to the start of the 1997–1998 basketball season, the Warriors would return to the Arena.

Consequently, the only change of note at the end of the season in 1996 was that everyone understood there would be no Warriors games at the Arena, and therefore no recall of vendors in accord with existing practice, until at least 1997.[7] There was no apparent need for bargaining about a new collective-bargaining agreement for the 1996–1997 season. The Respondent did not employ any vendors at the Arena for that season. As for bargaining about a new collective-bargaining agreement for the 1997–1998 season, the Union did, in fact, initiate a timely series of unsuccessful attempts to bargain with the Respondent, beginning in the summer of 1997, well in advance of the start of the season.

There remains for consideration the question whether the one-season hiatus in the Respondent's operations at the Arena extinguished the vendors' expectancy of recall and so affected the continuity of the Respondent's collective-bargaining relationship with the Union as to permit unilateral changes and, upon the hiring of a new work force for vending operations, to permit the Respondent's refusal to recognize and bargain with the Union. We agree with the judge that the hiatus did not have this disruptive effect.

The hiatus here was announced and implemented as a planned, temporary suspension of operations at the Arena. The vendors who performed unit work at the Arena were accustomed in any event to seasonal layoffs and to performing vendor work elsewhere in the Bay Area both during and between Warriors seasons. The Respondent did not tell them that they were terminated or that there would be any change in reemployment practices when the Arena reopened. As the judge correctly noted, the Board has emphasized the critical distinction between a temporary shutdown and an indefinite, apparently permanent, shutdown in determining whether a

[5] Our dissenting colleague makes too much of the General Counsel's failure to prove the identities of vendors, other than Danziger, Gohlke, and Jacobs, who worked during the 1995–1996 season. It is sufficient for purposes of establishing a violation of Sec. 8(a)(5) that the General Counsel proved through those witnesses that a regular group of vendors was employed and laid off in accord with an established past practice. The identification of other vendors in this group is a matter properly left by the judge to compliance proceedings.

[6] Our dissenting colleague would find justification for the Respondent's failure to bargain about actual changes, and its withdrawal of recognition, in the Union's supposed failure to request bargaining about changes that never took place. The dissent, for instance, perceives some significance in the Union's failure to request bargaining over the temporary relocation of vendors unit work to the San Jose Arena. We might agree if the issue here was whether the Respondent unlawfully failed to bargain about this one-season shift in operations, but that, of course, is not the issue. Nor is it material that the Union failed to request bargaining about the Respondent's proposed takeover of all Arena event services. The Union twice unsuccessfully requested bargaining for a complete successor agreement in the summer of 1997 without any response from the Respondent. Those negotiations would have provided the forum for discussion of any proposed expansion of the Respondent's Arena operations. Finally, and most significantly, there was no final agreement between the Respondent and the Coliseum, and there was no change in the scope of Respondent's vendor operations at the Arena for the entire 1997–1998 season.

[7] As stated, a subcontractor whose employees were represented by another union handled vendor operations for the Warriors' games played at the San Jose Arena.

collective-bargaining relationship survived the hiatus.[8] We find that distinction to be dispositive here. Accordingly, even if the Respondent's motivation for failing to adhere to the existing recall and vendor commission practices when Arena operations resumed in 1997 were based solely on legitimate business considerations, which, as stated below, it was not, we find that it violated Section 8(a)(5) and (1) of the Act by those unilateral changes. We further find that the Respondent violated Section 8(a)(5) and (1) by subsequently refusing to bargain with and withdrawing recognition from the Union.

For the reasons set forth fully in the judge's decision, we agree that the Respondent altered the established vendor recall procedures in order to avoid bargaining with the Union about what Respondent's manager, Brady, mistakenly believed would be exorbitant commission demands. In this regard, our dissenting colleague fails to articulate any cognizable reason why vendor Jacob's credited testimony about his conversation with Brady, the official responsible for hiring vendors, does not conclusively establish the Respondent's unlawful motivation. The failure of past-season employees to apply for jobs after the Union received belated notice of unlawfully implemented new hiring procedures certainly does not prove that the Respondent would have failed to recall the vendors absent its unlawful motive.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Golden State Warriors, Oakland, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

CHAIRMAN HURTGEN, dissenting.

The judge found that the Respondent violated Section 8(a)(3) and (5) by failing to recall, for the 1997–1998 professional basketball season, an unspecified number of union represented vendors who worked at the Oakland Coliseum during the Golden State Warriors' 1995–1996 NBA basketball season. My colleagues agree.

The Union represented vendors at the Oakland Coliseum during the professional basketball season of 1995–1996. This was the first season of such representation, and there was a 1–year contract. During the 1996–1997 season, the Oakland Coliseum was closed for renovation, and the games were played in San Jose. A different crew of vendors was hired, and a different union represented these employees.[1] In the 1997–1998 season, the teams returned to Oakland. The Respondent did not hire certain of the vendors who had assertedly worked at Oakland in the past. That nonhire is the basis for the 8(a)(3) and (5) allegations herein.

The 8(a)(3) allegation is based on the contention that the Respondent failed to hire the Coliseum vendors because it feared that such hiring would result in the Union's being the representative and that the Union would make excessive demands. The 8(a)(5) allegation is based on the contention that the Union remained the representative at all relevant times, and that the failure to hire the vendors was a unilateral change from past practices.

I turn first to the 8(a)(5) allegations. These allegations rest on three propositions: (1) the Union continued to be the representative for 1997–1998, even though the unit work was performed by other employees represented by another union in 1996–1997; (2) there was a past practice of rehiring vendors year after year, so that they had a reasonable expectancy of recall; (3) the Respondent unilaterally changed the past practice. I show below that the General Counsel has not established any of these points. Indeed, the evidence points affirmatively the other way.

Initially, I note that the record in this case is as significant for what it failed to establish as for what it did prove. Despite complaint allegations that the Respondent unlawfully failed to recall 12-named individuals as Coliseum vendors for the 1997–1998 Warriors' season, the record identifies only 3 individuals who had performed vending work for the Respondent at the Coliseum as of the spring of 1996 (the end of the 1995–1996 basketball season). The remaining evidence consisted of generalized testimony that an unidentified cadre of vendors, of unspecified number, generally returned to the Coliseum year after year, and that five or six of the remaining nine alleged discriminatees attended a preseason meeting conducted by the Respondent just prior to the 1995–1996 season. As found by the judge, there was no evidence that any of the nine were employed by the Re-

[8] Contrast *Rockwood Energy & Mineral Corp.*, 299 NLRB 1136, 1139 fn. 11 (1990) (lengthy temporary suspension of mining production does not relieve mine owner of duty to bargain), *El Torito-La Fiesta Restaurants*, 295 NLRB 493, 494–495 (1989), enfd. 929 F.2d 490 (9th Cir. 1991) (temporary closing of restaurant for remodeling did not warrant exception to contract-bar rule precluding election challenge to union's representative status), and *Schmutz Foundry & Machine Co.*, 251 NLRB 1494, 1496–1497 (1980) (no termination of bargaining obligation in absence of evidence of intent to close foundry permanently), with *Sterling Processing Corp.*, 291 NLRB 208, 209–210 (1988) (shutdown of indefinite duration, accompanied by discharge of all employees, extinguished expectancy of recall and permitted employer, prior to reopening after 19 months as a different operation, to modify preexisting wages and working conditions). In agreement with the judge, we find that although the *El Torito* Board addressed a contract-bar issue, the distinction drawn between temporary and indefinite, potentially permanent, employer shutdowns is applicable to other situations in which a hiatus in operations is alleged to justify unilateral changes upon the resumption of operations.

[1] There were no charges with respect to this matter.

spondent throughout the 1995–1996 season (a precondition, according to the judge, to any 1997–1998 recall rights), or that they were available or would have sought employment for the 1997–1998 NBA season. They did not in fact seek employment for the 1997–1998 season. Nor was there specific evidence about their employment by the Respondent during previous basketball seasons.

Next, despite the General Counsel's allegations that the Union had long represented Coliseum vendors employed by the Respondent, the judge found that the evidence established only that the Union became the vendors' 9(a) representative at an unspecified point in 1995, based on a 1-year agreement that the Union and Respondent negotiated for that season. That 2-page agreement consisted only of a recognition provision and terms governing vendor pay. The agreement also expressly stated that it would expire on August 31, 1996. And, unlike some other agreements that the Union has negotiated for vending employees of other employers, the agreement did not include any rollover provisions or terms providing for vendor seniority or recall rights.

Based on the 1995–1996 agreement, and vaguely testified to prior hiring practices, which "practices" are wholly lacking in formality as to hire and recall provisions, the judge and my colleagues find that the Respondent was required to rehire former Coliseum vendors that the Union represented. I disagree. Based on the circumstances in this case, I find that this largely unidentified "cadre" of former Coliseum vendors lacked a reasonable expectancy of rehire for the 1997–1998 basketball season.

As found by the judge, and conceded by my colleagues, it was widely known during the 1995–1996 season that the Coliseum would thereafter promptly close for renovations. It was further understood, and no party disputes, that the Warriors would thereafter play at least their 1996–1997 season at the San Jose Arena. Although it was hoped that renovations would be completed in time for the 1997–1998 regular basketball season, the Employer contracted with San Jose for a second season, if necessary.

There is no evidence that the Union requested bargaining over the relocation to San Jose, or sought to have former Coliseum vendors hired there. Indeed, the Union well knew that employees represented by another labor organization—rather than employees it represented—would perform that vending work.

Further, the Union made no attempt during the 1995–1996 season, or indeed for more than 1 year thereafter, to discuss with the Respondent the future status of its vendors. Nor did the Respondent represent to the Union, or offer assurances to any vending employees, that union-represented former employees would be rehired for the 1997–1998 season, or thereafter. The judge acknowledged that the Union did not seek, and the Respondent did not give, the vendors any assurances of future reemployment.[2]

Significantly, the Union learned—if not during the 1995–1996 season, at least while the Coliseum was being renovated—that the Respondent proposed changing the Coliseum's vending operations for the 1997–1998 season by creating a new corporation that would manage all Coliseum events.[3] Despite this knowledge, the Union did not request to bargain with the Respondent or seek a commitment that the Respondent would rehire employees it represented. Indeed, it was not until the summer of 1997, more than 1 year after the vendors it represented had last worked for the Respondent, and over 10 months following the expiration of the 1995–1996 agreement, that the Union approached the Respondent about bargaining. The Respondent did not accede to this request, and indicated that negotiations with the Coliseum for the takeover of all Coliseum operations were continuing.[4] When the Coliseum renovations were thereafter completed, and the Respondent began recruiting vendors in October 1997 for the 1997–1998 season, the Union renewed its bargaining request. The Respondent declined. Specifically, the Respondent relied on the following facts: its contract with the Union had expired more than 1 year earlier; it had no Union represented vendors in its employ; there was no agreement between the Union and the Respondent covering vending employees; it could not legally bargain with the Union, i.e., to do so would constitute illegal prehire bargaining. The Respondent did inform the Union, however, that it would consider any former union represented vendors for hire. It later also encouraged a former vendor to apply. None did.

[2] My colleagues assert that this failure to request bargaining signifies nothing since the Union was neither seeking recognition nor bargaining for San Jose. They miss the point. The significance lies in the fact that it shows total inaction by the Union—beginning with the 1995–1996 season and continuing long after the collective-bargaining agreement had expired—regarding the future hire of vendors, or their representation by the Union. As such, this fact is highly relevant to the issue of whether previous vendors had a reasonable expectancy of continued employment.

[3] The new corporation was created, but the Respondent remains the employer.

[4] My colleagues argue that it is immaterial that the Respondent was seeking to expand the scope of its operations at the Coliseum, because no such change was agreed to during the 1997–1998 session. This argument misses the mark. The time when the change occurred is immaterial. The significant fact is that, by seeking to significantly change its Coliseum operation, the Respondent called into question the nature of its operation and any assumption that prior vendors would have a reasonable expectation of future employment.

Under these facts, I find, contrary to the judge and my colleagues, that vending employees who worked at the Coliseum during and before the 1995–1996 Warrior season did not have a reasonable expectation of reemployment for the 1997–1998 season. In evaluating whether there is a reasonable expectancy that employees will be rehired, the Board and courts consider "the employer's past experience and future plans, the circumstances of the layoff, and whether the employee(s) were told about the likelihood of a recall." *El Torito-LaFiesta Restaurants v. NLRB*, 929 F.2d 490, 495 (9th Cir. 1991). Applying this test, I find that the record does not establish such a reasonable expectancy. In this regard, I note that: (1) the sole agreement between the Union and the Respondent, which expired more than 1 year before the events in question, included no seniority or rehire provisions; (2) the Union never sought any assurances or indeed even requested bargaining during the 1995–1996 season or for more than 1 year later, over future employment of former Coliseum employees; (3) no representations were made to employees at the end of the 1995–1996 season that they would be reemployed by the Respondent; (4) there was a hiatus of 16 months between the end of the 1995–1996 season and the start of the 1997–1998 Warrior season; (5) during the hiatus, the Respondent had no contact with the former employees or the Union concerning possible reemployment; (6) changes in the Coliseum operation and the proposed creation of a new entity to manage all Coliseum events.[5]

The judge sought to excuse this failure by noting that Respondent historically operated without formalities as to layoffs and rehires. I do not see how laxity prior to 1995–1996 somehow created rehire rights for 1997–1998. Nor do I agree with my colleagues that vague "practices" claimed by a few vendors to exist prior to the 1995–1996 season, when the Respondent was under different ownership, and when there was no bargaining obligation, constitute a past practice binding on the Respondent. This is particularly true since these alleged "past practices" are very loose indeed. Even according to the testimony of the few prior vendors, the Respondent historically did not guarantee employment to previously employed vendors, did not announce to the Union that it was rehiring, and did not systematically inform former vendors that hiring would occur. Rather, at most, some vendors working at the Oakland Coliseum would hear of openings, and would spread the word to others. I agree with the Respondent's argument on brief that "[a]bsent any indicia of formality or any affirmative representations by the Respondent of an intent to use the union as a hiring hall, this haphazard practice cannot be interpreted to be a substantive contract term." Nor does it establish a past practice.

Inasmuch as the 1995–1996 employees had no reasonable expectation of rehire, and in light of the more than 1-year hiatus of operations at Oakland, the Respondent had a lawful basis for not bargaining with the Union concerning the issue of who would be hired.

I find that *Sterling Processing Corp.*, 291 NLRB 208 (1988), supports my position. In *Sterling*, a plant closed for 19 months for economic reasons. Notwithstanding the facts that a contract was in effect when the closure began, and that the union stayed in regular contact with the employer during the shutdown, the Board found that former employees did not have a reasonable expectation of reemployment. Because they had been terminated at the time of the shutdown and none was working for the employer when it resumed operations after this lengthy hiatus, the Board concluded, in *Sterling*, that the former employees had no reasonable expectation of reemployment and, hence, the employer was not obligated to bargain with the union. Here, too, there was a substantial hiatus during which no union represented vendors worked for the Respondent. Although the 1995–1996 vendors were not formally terminated at the end of that season, there were no representations made to the Union of future employment, no assurances given employees about rehire, and no contract was in effect signifying an ongoing relationship between the parties. On the contrary, the Union knew that: vending work would be relocated to San Jose for at least the 1996–1997 season; employees it represented would not be performing it; and there was no contract that guaranteed the later return of employees it represented. Notwithstanding its knowledge of the above, the Union made no claim for the work during the 1995–1996 season and had no contact with the Respondent during the year following the 1995–1996 season.

I find that *El Torito-La Fiesta Restaurants*, 295 NLRB 493 (1989), on which the judge and my colleagues rely, is inapposite. Unlike the instant case, where there was no contract in effect at the time when reemployment was sought (or, indeed, for a substantial portion of the hiatus), a contract remained in effect for the entire 14-month du-

[5] I also note that as part of the renovation process the Respondent made some changes to its vending operation. For example, it replaced the portable stands that previously had been used with more, permanent structures. It also eliminated its manual inventory system and replaced it with a computer-generated system. Although, standing alone, these and other changes to the vending operation were not so substantial as to establish that the Respondent's vending operation had so altered as to defeat any expectation that the former vendors would be reemployed, I find that they should be considered when assessing whether such an expectation likely would exist.

ration of the shutdown in *El Torito*.[6] That contract, in *El Torito*, carried an irrebutable presumption of continued majority support, not here applicable. Further, unlike here, the employer in *El Torito* informed its employees prior to closing, that they were being laid off and would be notified that they could reapply for and return to their jobs when the restaurant reopened. And, during the hiatus there, the employer stayed in regular, written contact with the employees, informing them of the progress in renovations and discussing their future employment. None of that occurred here. To the contrary, previous (and largely unidentified) employees left their employment in the spring of 1996, without any assurances of future employment.

In sum, based on all of the circumstances, I find that former vendors at the Coliseum did not have a reasonable expectation of reemployment for the 1997–1998 season. Phrased differently, there was no past practice whereby expectations of hire would be reasonable, and thus there was no change in past practice. Further, in the absence of a reasonable expectancy of rehire, the Union lost its representative status in 1997–1998, inasmuch as the unit work in 1996–1997 was performed by other employees represented by another union. Accordingly, I would dismiss the 8(a)(5) allegation.

I also find that the Respondent did not violate Section 8(a)(3) by failing to rehire former Coliseum vendors for the 1997–1998 season. As previously discussed, these former employees did not have a reasonable expectation of reemployment. Nor was the Respondent legally obligated to rehire them. Moreover, when hiring vendors for the 1997–1998 season, the Respondent specifically informed the Union that it would consider former employees for hire, and provided the Union with an individual to contact. Additionally, the Respondent even solicited a former employee to work for it. None did. In these circumstances, I find no merit to the allegation that, but for their Union adherence, they would have been hired.

The General Counsel relies on a conversation between a former vendor and Respondent's agent (Brady). The former vendor asked Brady if the former vendors would be coming back to work at the Coliseum. Brady responded, "No," stating that the Union was asking for a 35-percent commission rate. The vendor replied, "OK," and left.

Contrary to the judge, I do not find that Brady's statement to the vendor establishes an unlawful refusal to hire. Admittedly, Brady was incorrect in his assertion that the Union was necessarily seeking a 35-percent commission rate; indeed, the parties had not engaged in any bargaining at that point. However, I reject my colleagues' assertion that, standing alone, Brady's incorrect statement conclusively establishes that the Respondent unlawfully refused to hire any prior vending employees. Indeed, the Respondent made clear to the Union that it would consider for hire any former vendors who applied for work, and affirmatively solicited the application of one former employee.

Even assuming arguendo that Brady's statement was unlawful under Section 8(a)(1), the evidence is insufficient to establish a prima facie case that the failure to hire was unlawfully motivated. Further, even if there were a prima facie case, Respondent has shown that these employees would not have been hired in any event. In this regard, I note inter alia that they did not even apply for employment.

Finally, the General Counsel notes that when the Respondent contacted various groups when seeking vendors for the 1997–1998 season, it did not initially contact the Union. However, the relevant fact is that it *did* inform the Union during the hiring process that it would consider former employees.

Virginia Jordan, Esq., for the General Counsel.
Jeffrey S. Bosley, John C. Corcoran, and *Kent Jonas, Esqs. (Thelen, Marrin, Johnson & Bridges, LLP)*, of San Francisco, California, for the Respondent.
John Arnolfo, Business Representative, of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON**,** Administrative Law Judge. This is an unfair labor practice prosecution alleging that Golden State Warriors (the Respondent) violated Section 8(a)(3) and (5) of the National Labor Relations Act. It is brought by the Regional Director for Region 32 of the National Labor Relations Board, who issued a complaint and notice of hearing on April 30, 1998, in the name of the Board's General Counsel, following his investigation of a charge filed on March 11, 1998 (amended March 19), by Concession Vendors Union Local 468, a/w Graphic Communications International Union, AFL–CIO (the Union). I heard the case in 2 days of trial proceedings conducted in Oakland, California, on October 29 and November 16, 1998.[1]

[6] In my view, the judge—when discussing *El Torito*—and my colleagues, in relying on it, failed to properly emphasize the extent to which that decision turned on the "contract-bar" principle. Thus, the issue in *El Torito* was specifically limited to whether a temporary hiatus in operations would eliminate an extant contract as a bar. And the Board's analysis was restricted to whether there was a contract bar, or whether there were "unusual circumstances" which precluded it from being a bar. Here, of course, there was no contract in effect.

[1] A preliminary note on certain trial developments and rulings that I will revisit in further findings, infra: After the General Counsel rested the prosecution's case-in-chief on October 29, the Respondent called two of its three intended witnesses, whose examination lasted through

In certain background paragraphs, the complaint alleges that, "[a]t all times material herein since at least 1960," the Union has been recognized by the Respondent as the "designated exclusive collective bargaining representative" of a unit of souvenir-merchandise vendors employed by the Respondent to work its home games in the Oakland Coliseum Arena, and that Respondent's recognition of the Union has been "embodied in successive collective bargaining agreements, the most recent of which . . . was effective . . . for the period September 1, 1995 to August 31, 1996." Substantively, the complaint alleges that the Respondent violated recognitional and bargaining duties owed to the Union under Section 8(a)(5) when it took the following actions in October–November 1997, shortly before beginning its 1997–1998 professional basketball season: (a) unilaterally departing from its historical practice of recalling past-season vendors and instead recruiting and hiring new employees for this work; (b) withdrawing recognition from the Union as the exclusive representative of the Oakland home-game vendors; and (c) unilaterally changing the manner of compensating those employees, by substituting an hourly-pay scheme for the traditional, "commission-base" arrangement. The complaint further alleges that the Respondent's "failure to recall" past-season vendors independently violated Section 8(a)(3) of the Act and resulted in unlawful discrimination against 12-named persons.

The Respondent admits, and I find, that the Board's jurisdiction is properly invoked over this dispute,[2] and that the Union is a labor organization within the meaning of Section 2(5) of the Act. While the Respondent denies the existence of a history of recognition of and collective bargaining with the Union "since at least 1960," the Respondent admits that it was bound to the 1995–1996 labor agreement with the Union adverted to in the complaint. Subject to elaboration below, the Respondent further admits that, following a "hiatus" in operations at the Oakland Coliseum Arena during the 1996–1997 season (involving the relocation of its home games in that season to the San Jose Arena while the Oakland Coliseum Arena was undergoing extensive renovations), it declined to recognize or bargain with the Union as the vendors' representative when it returned to the Oakland venue for the 1997–1998 season, that it did not "recall" vendors for that season from the ranks of past-season vendors, but instead recruited new-hires from outside sources, and that it unilaterally established the compensation terms for these new hires, terms that differed from the commission scheme used in its prior seasons at the Oakland venue.

However, the Respondent denies all alleged wrongdoing, and most of its defenses are grounded, directly or indirectly, in the significance it attaches to the "hiatus," i.e., the one-season relocation to the San Jose Arena. Thus, as to the 8(a)(5) counts, the Respondent avers centrally that because of the hiatus, it operated under no duty to recognize or bargain with the Union after it returned to the renovated Oakland venue for the 1997–1998 season, and, for the same reason, it was free to act unilaterally when it came to hiring vendors for that season and setting their wages and other terms and conditions of employment. Moreover, as to the 8(a)(3) count, the Respondent avers as a central defense that none of the 12-named alleged discriminatees applied for vendor positions during the 1997–1998 season, although invited by the Respondent to make such applications.

As is already implied, a question central to the disposition of the 8(a)(5) counts in the complaint is whether or not the collective-bargaining relationship evidenced by the 1995–1996 labor agreement survived the Respondent's departure from its traditional home-court venue in Oakland and its removal to the San Jose Arena during the 1996–1997 season. As I discuss in my concluding analysis, the resolution of this issue depends in large part on whether the vendors employed in Oakland during the 1995–1996 season had a reasonable expectancy, at the end of that season, of being recalled for work in the 1997–1998 season, when the Respondent returned to its Oakland home court after its one-season sojourn in San Jose. The most important considerations in making a determination on the "reasonable expectancy" question is the nature of and reasons for the hiatus—specifically, whether it was intended to be "indefinite" or merely "temporary." Accordingly, the Respondent's reasons for and intentions respecting the hiatus will ultimately be a critical feature in determining whether the preexisting collective-bargaining relationship survived the hiatus.

Based on my study of the whole record, including the parties' posttrial briefs,[3] and based particularly on the findings and

the end of the day, at which point the trial was recessed until November 16, a date on which, by prior agreement of all parties and by my direction, the Respondent would conclude the balance of its case by calling a previously unavailable witness, to be followed by any appropriate rebuttal from the prosecution side. However, when the trial resumed on November 16, counsel for the General Counsel moved to reopen her case-in-chief to introduce two purported labor agreement documents and authenticating testimony, plus additional background testimony. All of these were aimed at proving allegations in the complaint that the Respondent had denied and the prosecution had failed to establish during its case-in-chief—that, "since at least 1960," the Respondent had recognized the Union as the exclusive representative of a unit of its souvenir-vendors and had entered into "successive collective bargaining agreements" with the Union covering that unit. The Respondent opposed the General Counsel's motion to reopen, and I denied it, based on considerations I noted summarily on the record and which I restate elsewhere below.

[2] Based on the pleadings and stipulations of the parties, I find, (a) that the Respondent, owned by a California partnership since January 19, 1995, operates a professional basketball team and related business enterprises, (b) that in the 12 months preceding the issuance of the complaint the Respondent received gross revenues from these operations exceeding $500,000, and (c) that the Respondent, since January 19, 1995, has been and is an employer engaged in commerce within the meaning of Sec. 2 (2), (6), and (7) of the Act.

[3] The Respondent has separately filed a motion to strike certain portions of the General Counsel's brief wherein prosecuting counsel has made factual averrals unsupported by appropriate citation to the record—averrals, moreover, which the Respondent argues cannot be supported by the record. The General Counsel has filed no responsive papers. As I note incidental to my findings, infra, the Respondent's motion is substantially meritorious as to certain of the General Counsel's claims. The General Counsel's brief is, indeed, seriously flawed—not least, in its usefulness to the judge to whom it is addressed—by a number of breezy averrals of fact that briefing counsel does not trouble to support with citation to the record, including several that enjoy no record support whatsoever—particularly as to the supposed existence of a lengthy history of collective bargaining and a succession of agree-

reasoning set forth below, I will judge that the hiatus was plainly temporary in nature, that the Oakland vendors thus had a reasonable expectancy of being recalled when work again became available at the Oakland Arena, and, accordingly, the collective-bargaining relationship survived the San Jose sojourn. Considering, moreover, that the Respondent admittedly refused to recognize or bargain with the Union on and after October 23, 1997, and took other unilateral actions substantially as alleged in the complaint, I will find merit to all the 8(a)(5) counts in the complaint. Finally, based on a somewhat different body of considerations, I will find merit to the independent 8(a)(3) counts in the complaint, alleging discriminatory bypassing of past-season vendors in favor of new hires. However, in so finding, I will not fully embrace the list of 12 alleged discriminatees named in the complaint as an accurate roster of the victims of the Respondent's discriminatory hiring.

I. FINDINGS

A. The Respondent's Traditional Operations in Oakland; the One-Season Hiatus

Golden State Warriors (i.e., the Respondent) is an ongoing business entity franchised by the National Basketball Association (NBA) to operate a professional basketball team, the Golden State Warriors (the Warriors). The Warriors compete with other NBA teams in league play conducted under NBA rules. In the last 20 years or so, the franchise has been held by at least three different persons or entities; first, by "Franklin Mieuli" (or "Mewley"—the transcript contains both spellings); then, starting sometime in the late 1980's, by the "Finan & Fitzgerald" group; then, since January 19, 1995, by the current franchise holder, a California partnership headed by Christopher Cohan.[4]

Barring strikes or lockouts, the Warriors have always competed with other NBA teams during a roughly 6-month "official" season that begins in the first week of November of each year and ends sometime in May of the following year. The Warriors will also play several scheduled, preseason exhibition games, usually in the last 2 weeks of October. The team may also play postseason games into June, depending on whether it makes the playoff rounds for the NBA Championship, and, if so, how far it gets.

For at least 20 years prior to the 1996–1997 NBA season, the Warriors had played all their home games at the Oakland Coliseum Arena (Oakland Arena), part of a publicly owned sports-entertainment complex that also includes the Coliseum Stadium, the home field of the Oakland Athletics professional baseball team. However, as a result of detailed arrangements worked out between the Respondent and the operators of the Coliseum complex in early 1996, the Oakland Arena underwent top-to-bottom renovations during a period that started soon after the conclusion in May 1996 of the 1995–1996 NBA season and continued through the entire 1996–1997 season, indeed through the summer and early autumn of 1997.

Because the Oakland Arena was unavailable for play during the 1996–1997 season, the Warriors ended up playing their home games during that season in the San Jose Arena (and, as well, their preseason home games in October 1997.[5] This one-season relocation was clearly intended by the Respondent from the start as a temporary expedient, one that would bring the Warriors back to Oakland for the 1997–1998 season, which is, in fact, what happened.[6] Indeed, the Respondent had held a series of press conferences beginning in February 1996 that had resulted in widespread media publication of exactly these intentions and expectations.[7]

B. Historical Practices Associated with the Respondent's Employment of Souvenir-Vendors at the Oakland Arena[8]

The Respondent has always received revenues from the sale of souvenir merchandise at Warriors games, such as programs, hats, shirts, and other novelties bearing the team logo. The Respondent was not originally the direct employer of the persons who sold such merchandise at its home games in Oakland, but the Respondent assumed such a direct employer role sometime in the late 1980s, when the Finan & Fitzgerald group took over the franchise, and it has continued in that role since then.

These are some of the background details: Under Franklin Mieuli's ownership (according to Danizger), the Respondent had granted a vending concession to Bill Fritz (who is elsewhere identified by Danziger as having later become the Union's "president or vice president" for an uncertain period) to handle all such sales, and Fritz had, in turn recruited other vendors to assist in handling the concession. These vendors (or at least Fritz) apparently operated in an independent-contractor role. Thus, under the concession arrangement, they would acquire the souvenir merchandise directly from outside sources, establish their own prices for the items, sell them to customers

ments between the Union and the Respondent preceding the agreement that was admittedly in effect during the 1995–1996 season.

[4] For findings about pre-1995 ownership of the franchise, I rely primarily on the uncontradicted testimony of Donald Gohlke, one of the three witnesses who were longtime employee-vendors of Warriors merchandise at the Oakland Arena. (The other two such witnesses were Robert Jacobs and Dennis Danziger.)

[5] I take notice that the San Jose Arena is about 50 miles, or about 1-hour's freeway driving, from the Oakland Arena.

[6] This is what Robert Rowell, currently the Respondent's vice president of business operations, said on the subject of the Respondent's intentions and expectations concerning the relocation to San Jose and the return to Oakland:

> Q. Did—in terms of the extent of time the Warriors would play in San Jose, what was your understanding about the length of time the Warriors would play at the San Jose Arena?
>
> A. My understanding, per our license agreement that was negotiated and finalized in May of 1996 with the City and County was that we were to play the 1996–97 season down in San Jose and we're to come back for the opening of the 1997–98 season in the new arena in Oakland, based on the construction time line getting completed and if, in the event we were to [lose] out on games, we would play one or two games in San Jose before we returned to Oakland.

[7] Several articles in the local print media tracing from the Respondent's press conferences were received into evidence as R. Exhs. 2 and 3.

[8] In this section and hereafter, "historical" and "historically" refer to the period that began with the Finan & Fitzgerald takeover in the late 1980's and ended with the conclusion in May 1996 of the 1995–1996 season, by which point the Cohan partnership had been operating the franchise for about 18 months.

attending the home games, and rebate a certain percentage of their sales receipts to the Respondent. Starting with the Finan & Fitzgerald group's takeover in the late 1980s, however, the Respondent changed the arrangement: The Respondent became the exclusive supplier of the souvenir merchandise to the vendors, and the supplier, as well, of the portable vending stands used by the vendors. The Respondent also took control of merchandise pricing, and retained physical control of the merchandise and vending stands between games and seasons. Finally, the Respondent took control over the merchandise sales receipts, and paid the vendors directly for their sales work, on a commission-percentage basis at all times through the 1995–1996 season.[9]

In addition, at all times since the late 1980s, the Respondent has directly supervised the Oakland vendors in their sales work, cash and inventory control, and related tasks, using for these purposes a succession of managers. During most of the historical period under discussion, Jim Sweeney, the Respondent's merchandise manager, was the supervisor immediately in charge of the Oakland vendors' work. Sweeney remained in this capacity until his departure from the Respondent's employ in December 1996 or January 1997, about a year after the Cohan partnership had acquired the franchise.

Historically, the Respondent observed a number of practices, however informal, relating to the seasonal employment, layoff and recall of vendors who worked the Warriors' home games in Oakland. From the credible, harmonious, and uncontradicted accounts of longtime vendors Jacobs, Danziger, and Gohlke, I find as follows:

Over the years, the Respondent employed a regular cadre of vendors to work the Oakland Arena vending stands during Warriors home games. (The record does not show exactly how many employees comprised this cadre, nor does it clearly indicate the identities of all the cadre members, but Jacobs, Danziger and Gohlke were surely among them.[10]) Between Warriors home games, and outside the NBA season, many of these vendors also worked in similar capacities for other employers in various San Francisco Bay Area sports and entertainment venues, such as for the Oakland Athletics, at the Coliseum Stadium.

As each new NBA season drew nigh, Merchandise Manager Sweeney (like his predecessor, Carl Bascowitz) would seek out the past-season vendors and invite them to a kickoff "luncheon" meeting, typically held in mid-October, on the day when the Warriors were scheduled to play their first, preseason exhibition home game. Notice of these meetings was given casually, by word-of-mouth. Sometimes Sweeney would run into some of the past-season vendors as they were working the Oakland A's games at the Coliseum Stadium and would tell them when to show up for this season's kickoff meeting. At other times Sweeney would pass the information on through telephone calls to one or more vendors. In either case, the vendors who got the word would then pass the message along to other past-season vendors. Typically in these meetings, as the gathered vendors ate a lunch furnished by the Respondent, Sweeney would review new merchandise and pricing with them and supply them with any "giveaway" items, as well. When the meeting ended, the vendors would gather their inventory of merchandise and the portable vending stands from a storage area maintained by the Respondent under the Coliseum Stadium, and would take them to sales points in the Oakland Arena that they would continue to occupy (working in two- or three-person teams at each stand) during all subsequent home games through the end of the season. Between games, the vendors would return the stands and merchandise to the same storage area in the Coliseum stadium, then retrieve them for the next game.

Each season ended this way: When the Warriors finished their last home game, the vendors would return the vending

[9] And see Gohlke's descriptions, contrasting employment arrangements during the Mieuli era with those that emerged after the Finan & Fitzgerald takeover, as follows:

> First was I worked with Franklin Mieuli. In fact, in 19—that would have been prior to 1988. Actually, I worked there when our union actually ran it, and that would have been as early as 1978, I think.
>
> JUDGE NELSON: When your union did what?
>
> THE WITNESS: The union itself ran the souvenirs. There was no—when we worked for Franklin Mieuli, Franklin Mieuli did not operate the souvenirs themselves. When Finan Fitzgerald bought the team they operated the souvenirs themselves and we worked for them.
>
> JUDGE NELSON: Let me see if I can understand this. In the first situation you described you folks were independent operators?
>
> THE WITNESS: We answered to Franklin Mieuli. He did not pay us directly.
>
> JUDGE NELSON: He furnished the—
>
> THE WITNESS: He owned the team and we had permission from him to sell the souvenirs.
>
> JUDGE NELSON: Where did you get the souvenirs?
>
> THE WITNESS: Our own people bought them.
>
> JUDGE NELSON: Not from the Warriors?
>
> THE WITNESS: No.
>
> JUDGE NELSON: And you sold them?
>
> THE WITNESS: Yes, sir.
>
> . . . .
>
> JUDGE NELSON: Not even a subcontractor. . . . Just you've got a right to be on the premises and to sell a product that you've independently bought and you sell it for the price that you've set?
>
> THE WITNESS: Yes, sir.
>
> JUDGE NELSON: Is that right? All right. Then later that changed?
>
> THE WITNESS: When Finan and—Mr. Finan—bought the team, then we worked for—let's see, at that time Carl Maskowitz was our immediate supervisor and we were paid by the Golden State Warriors.
>
> JUDGE NELSON: And they furnished the materials that you sold?
>
> THE WITNESS: Stands. Merchandise. Yes.

[10] The testimony of these three witnesses established that for at least a decade prior to the start of the 1997–1998 season each had been employed by the Respondent at the Oakland Arena throughout each successive season, including through the 1995–1996 season. However, as I discuss elsewhere below, the only evidence suggesting which individuals were employed as vendors during the 1995–1996 season is contained in Jacobs' testimony, infra, naming vendors who attended a kickoff meeting conducted by Merchandise Manager Sweeney at the start of that season.

stands and unsold merchandise to the storage area in the Stadium, and, usually about a week after this, they would get together with Sweeney for a final inventory and an accounting of who was owed what, followed by an equal "split" among the vendors of an agreed-on "commission" percentage of the pooled net sales proceeds for the season.[11] (The commission rate was 20 percent prior to an uncertain date in 1990 or 1991, when the Union and the Respondent negotiated a reduction to 16 percent, the rate that prevailed at all times thereafter through the end of the 1995–1996 season.) When this process was completed, the group simply broke up, usually with parting words from Sweeney to the effect, "Thanks for a good year." Nothing would be said then about employment in next year's season.

The vendors' testimony shows that, throughout the historical period described above, the Respondent never furnished any written notices of layoff at the end of the season, nor written notices of recall as the new season began. Indeed, so far as this record shows, the seasonal patterns of layoff and recall were unattended by any kind of paperwork—not even any internal business recordations—that might imply a severance of the vendors' employment relationship with the Respondent between seasons.

C. The Respondent's Collective-Bargaining Relationship with the Union

The Union generally exists to represent the interests of vendors who sell souvenir merchandise at sports matches and other entertainment events held in various venues in the San Francisco Bay Area. Many of its members work for more than one employer, and in a variety of venues, during the course of a year. One example has already been cited: A vendor may be employed by the Oakland Athletics baseball franchise during the baseball season home games at the Coliseum Stadium, then, following a brief interlude, begin working for the Respondent during the Warriors' NBA season home games in the Oakland Arena. Also, between these games or seasons, the vendors may acquire similar employment for events held elsewhere in the Bay Area, such as in the Cow Palace (in Daly City, across the Bay from Oakland), or in the Stanford University Stadium (in Palo Alto, also across the Bay).

Sometime after the Cohan partnership acquired the franchise in January 1995, the Union and the Respondent signed a written collective-bargaining agreement, made effective by its terms from September 1, 1995, to August 31, 1996, covering the employment of vendors working at the Oakland Arena. The agreement was signed for the Union by John Arnolfo, its recently-installed business agent, and by Paul Saroff, then the Union's chief executive. It was signed for the Respondent by Karen Cole, its director of business operations. The signatures were undated. Arnolfo testified that he did not participate in the negotiating of this agreement, nor did he recall the timing of his signing it. Saroff was not called to testify about such matters, nor was Cole. In sum, the record remains wholly vague as to the timing and other circumstances surrounding the execution of the 1995–1996 agreement.[12]

Although surrounding circumstances are uncertain, the material terms of the agreement itself are easy to identify, for the document is quite brief. Thus, in its preamble, the agreement recited that it was "made and entered into effective September 1, 1995," and

> cover[s] the sale of programs and novelties from portable stands and in the seating area during GOLDEN STATE WARRIOR BASKETBALL GAMES at the Oakland Coliseum Arena.

And in its recognition clause (sec. 1), it further recited that,

> The Employer recognizes the Unions [*sic* [13]] as the sole and exclusive collective bargaining agent for all employees engaged in the sale of Golden State Warriors programs and novelties and agrees to deal with its representatives with respect to wages, hours, working conditions, adjustment of grievances and all other pertinent matters.

This is a good point for pausing to head off any confusion as to the proper description of the "bargaining unit" established by the 1995–1996 agreement: The General Counsel's description of the "Unit" on brief differs from the description of the "Unit" appearing in the complaint, and each of these descriptions, moreover, involves more than a little tinkering with the unit description appearing in the 1995–1996 agreement, supra, which the General Counsel nevertheless cites as the record source for the "Unit" description appearing in the prosecution brief.[14] While "the Unit" might be characterized in a variety of

[11] As the payment scheme was most particularly described by Jacobs, "There was a split. In ou[r] language the terminology is split, all the money went into the pool and we were paid a commission on that. It was split evenly amongst those that worked."

[12] Contrary to the General Counsel's unsupported averalls on brief (p. 4), the record contains no evidence that would allow a finding that the "parties . . . bargain[ed]" this agreement "[s]ometime in about August 1995." Nor does the record show that "this new agreement contained the same provisions as the expired agreement." In fact, prosecuting counsel provides no hint as to what "agreement" she has in mind when referring to "the expired agreement." (Perhaps she is referring to Dennis Danziger's testimony, infra, concerning certain negotiations between the Union and the Respondent leading to an oral agreement sometime in 1990 or 1991, but if so, Danziger's account is too sketchy to support the General Counsel's claim that the agreement reached in 1990 or 1991 included "the same provisions" as those set forth in the written 1995–1996 agreement.) Accordingly, I grant the Respondent's motion to strike these unsupported assertions from the General Counsel's brief.

[13] The pluralization appears to be a typo, for in the preamble, the recognized union is identified as a single entity, described as follows: "Newspaper & Periodical Vendors and Distributors Union Local 468, affiliated with the Graphic Communications International Union, AFL–CIO, on behalf of CONCESSION AND PROGRAM EMPLOYEES CHAPEL, hereinafter referred to as the 'UNION.'" Moreover, the singular form, "the Union," appears elsewhere in the agreement, at Sec. 5.

[14] In the complaint, the "Unit" for which the Respondent has supposedly recognized the Union as the exclusive representative "since at least 1960" is described as follows:

> All full-time and regular part-time employees engaged in the sale of Golden State Warrior programs and novelties at the Oakland Coliseum Arena, Oakland, California; excluding all other

ways without doing violence to the contracting parties' intentions, I deem it best to treat their contract language itself as defining the appropriate bargaining unit. Accordingly, when I refer to the "unit," or the "vendors unit," or the "bargaining unit," I am referring to that unit which readily may be inferred from combining the language appearing in the preamble with the language in the recognition clause.

In the four remaining enumerated clauses of the 1995–1996 agreement, the parties agreed (at sec. 2) that "Program and Novelty vendors shall be paid Sixteen Per Cent (16 percent) commission on all sales, after sales tax;" (at sec. 3) that "Vendors engaged solely in the sale of programs shall be paid Twenty Per Cent (20 percent) commission on all sales, after sales tax"; (at sec. 4) that "the employer shall pay the sum of One Per Cent (1 percent) of gross sales effected by vendors employed under the terms and conditions of this Agreement, into the 'CONCESSION AND PROGRAM EMPLOYEES PENSION TRUST FUND.' Maximum not to exceed $500.00"; and (at sec. 5) that "the Union will furnish sufficient help with a satisfactory skill level as required by the Employer." And in a final, unnumbered clause, the agreement recited that it "shall remain in full force and effect from the date first written above [i.e., September 1, 1995] to August 31, 1996."

The Respondent has admitted in general terms that this agreement reflected a "memorializ[ation]" of an "arrangement" of uncertain duration between the Respondent and the "Union's vendors."[15] What is decidedly less clear on this record, however, is whether this historical "arrangement" had ever been "memorialized" *previously* by the Union and the Respondent in any clear-cut way. Put another way, the record leaves great room for doubt on such questions as these: Did the conceded historical "arrangement" between the Respondent and "the Union's vendors" encompass *all* of the terms set forth in the 1995–1996 agreement? Did the historical arrangement contemplate, for example, a recognition of the Union as the vendors' exclusive collective-bargaining representative? The discussion requires some backtracking, in part to revisit the trial developments I noted at the outset:

The complaint alleges in pertinent part that "since at least 1960 [the Union] has been the designated exclusive collective bargaining representative of the employees in [a certain previously described] Unit, and since said date until October 23, 1997 was recognized as such by the Respondent[,]" and that "[s]uch recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms for the period September 1, 1995 to August 31, 1996." In its answer, the Respondent, although admitting the existence of the 1995–1996 agreement, denied the existence of a recognitional or bargaining history dating back to 1960, and further denied a history of "successive collective bargaining agreements" since 1960.

The Respondent had issued a trial subpoena to the Union seeking a category of records that included copies of all purported collective-bargaining agreements and related correspondence between the Union and the Respondent preceding the admitted 1995–1996 agreement. However, even though the General Counsel had averred in her opening statement that "a number of [such] agreements" existed, the Union's representative, Arnolfo, soon testified that an extensive search of the Union's archives for any such records had yielded none[16] (other than one, unsigned, undated purported "agreement" document, a document that could not be authenticated by any of the witnesses called by the General Counsel during the prosecution's case-in-chief). Counsel for the General Counsel later acknowledged the absence of such "successive agreement" records before she rested her case-in-chief, saying, "It appears that nobody has any copies of any collective bargaining agreements beside the 1995 to 1996 agreement. We have checked not only with Mr. Arnolfo but with other union members who were in this bargaining unit as to whether they ever had copies and the answer appears to be no." Indeed, vendor Jacobs, whose work for the Respondent dates back to the mid-1980's, testified that

employees, office clerical employees, managerial employees, guards, and supervisors as defined in the Act.

By contrast, in the General Counsel's brief, the "Unit" is now (unaccountably) described in these different terms:

> All full-time and regularly scheduled part-time vendors of novelties and programs at the Oakland Coliseum employed by the Employer; excluding all other employees, guards, and supervisors as defined in the Act.

On brief, the General Counsel's only citation associated with her description of the "Unit" in the latter terms is to "GC Exh. 2"—i.e., to the 1995–1996 agreement. The fact is that neither the description in the complaint nor the General Counsel's latest stab at a description on brief corresponds faithfully with the description set forth in the 1995–1996 agreement. However, it at least may be said in favor of the complaint's description that it limits the Union's representative rights to a unit of vendors who sell Warriors merchandise at the Oakland Coliseum Arena, just as the 1995–1996 agreement did, whereas the "Unit" described in the prosecution brief implies a broader jurisdiction, to sales in the "Coliseum" as a whole.

[15] On April 9, 1998, the Respondent's attorney, Jeffrey Bosley, furnished a written statement of position to the Board agent investigating the Union's charges herein. (GC Exh. 8.) There, he stated (my emphasis): "Initially, the new [Cohan] ownership left many established operations in place, *including the team's arrangement with the Union's vendors* to perform merchandise sales duties at the Oakland Coliseum Arena. *This arrangement is memorialized* in the [1995–1996] collective bargaining agreement[.]"

In this regard, I note, moreover, that what Attorney Bosley referred to as "initial" arrangements "memorialized" in the 1995–1996 agreement were actually arrangements that endured not just through the balance of the 1994–1995 season, but through the ensuing 1995–1996 season, as well.

[16] Arnolfo testified pertinently as follows:

> Q. Okay. In fact, you also had no personal knowledge of any signed and fully executed labor agreement between the Warriors and the Union, other than General Counsel's Exhibit 2 [the 1995–1996 agreement]; is that correct?
>
> A. That's correct.
>
> Q. And your search of the Union's files revealed no such documents?
>
> A. That's correct.
>
> Q. And you have no—your search of the Union's files in response to the subpoena also revealed no notes reflecting any bargaining history between the Warriors and the Union from 1960 to the present; is that correct?
>
> A. That is also correct.

he had never even *seen* a copy of any such labor agreement prior to the 1995–1996 agreement.

As I have previously noted, the record remained in this posture when the General Counsel rested the prosecution case-in-chief on October 29, 1998, following which the Respondent's presentation occupied the balance of that day. Then, pursuant to prior agreements and directions, the trial was recessed until November 16, when the Respondent would conclude its case by calling a previously unavailable witness, Aaron Brady. When the trial resumed for this purpose on November 16, however, counsel for the General Counsel moved to reopen her case-in-chief to introduce purported copies of two prior written and signed agreement documents. These were said to have been discovered recently by the Union in the office of an (unidentified) "former legal counsel" of the Union (apparently one who had represented the Union during the periods covered by the purported agreements), and these were said to have been discovered as part of a search that the Union had conducted with renewed vigor during the nearly 3-week trial recess period. The General Counsel's motion to reopen also contemplated that the prosecution would call Paul Saroff, the Union's former principal representative, whom the General Counsel had not called as a witness during her case-in-chief, to authenticate the recently discovered agreement documents. The General Counsel also proffered Saroff as a witness who would testify about a variety of *other* matters of background and practice, including some which had been sketchily addressed during the prosecution's case-in-chief and others which amounted to entirely new areas of proof in support of the complaint. Indeed, this proffer of additional background testimony from Saroff came only after I had denied the General Counsel's motion to reopen to introduce the two purported agreement documents through Saroff as an authenticating witness. Thus, the General Counsel further offered to prove through Saroff as follows:

> that since at least the 1980s when the Warriors moved to the East Bay Oakland location from San Francisco and were owned by a gentleman named Franklin Mieuli that from that time forward the Union has had a series of collective bargaining agreements with the Warriors covering the bargaining unit at issue in this case. . . . He [Saroff] would further testify that the procedure used for layoff and recall of the bargaining unit employees who sold concessions and programs—not concession, novelties and programs was that when the season ended, they ended. When the season started, Jim Sweeney the former manager in the concession area would notify the employees to return to work. He would also testify that if, in fact, there were not enough people, Mr. Sweeney would call him, and the Union would provide additional employees as needed. He would further testify that based on his knowledge as the business agent or business representative during that period of time that the Warriors through the period at least of June 1996 continued to remit funds to the pension trust fund as called for in the collective bargaining agreements.

The Respondent opposed the General Counsel's motion to reopen her case-in-chief, and I denied the motion, based primarily on the following considerations, all of them adverted to more summarily in my trial ruling: First, the attorney who had represented the Union at times relevant to the purported agreements was always an obvious potential custodian of copies of any agreements negotiated by the Union during the period of his representation. Thus, the Union or the General Counsel, both having a distinct interest in discovering such records to support claims in the complaint, could have been expected in the exercise of ordinary diligence to have made inquiries of this attorney, and thereby to have discovered the late-proffered records far earlier, before the trial opened. Moreover, apart from the prosecuting parties' own interest in making a diligent search *before* the trial for any such records, the Union clearly operated under an independent legal obligation to make such a diligent search in order to comply with the Respondent's trial subpoena. And its lack of diligence on this score effectively frustrated the Respondent's right under the subpoena to discover these late-proffered documents at the start of the trial, so that it could investigate and prepare any defense to their introduction or their significance. Relatedly, I judged that to grant the motion to reopen would unduly interfere with an orderly conclusion of the case, because it would (a) necessarily cause an interruption of the Respondent's presentation, (b) very likely would require a continuance of further proceedings to a future date sufficiently far away to permit the Respondent now to investigate the newly proffered documents and testimony, and (c) very likely would entail in the end much collateral litigation concerning the circumstances surrounding the late-proffered evidence. Finally, as to proffered testimony by Saroff regarding other matters of background, the General Counsel made no showing that Saroff had been unavailable to testify about such matters during the prosecution's case-in-chief.[17]

It is against this background that I now address certain claims still maintained by the General Counsel as to the supposed existence of a longstanding recognitional and contractual relationship between the parties: To do this requires first some deadwood-clearing: The complaint alleges in part that the Respondent has recognized the Union as the exclusive representative of its Oakland vendor-employees "since at least 1960." The record plainly will not sustain this claim; indeed, the proof contradicts it. Thus, as previously noted, it clearly appears that, prior to the Finan & Fitzgerald group's acquisition of the franchise in the late 1980's, the vendors operated as independent contractors, or "concessionaires," of the Respondent, not as the Respondent's "employees." Seemingly in partial recognition of this, the General Counsel has stripped 17 years from the claim made in the complaint, and now avers instead (Br. 2) that the Union has been the exclusive representative of the vendor-employees in the "Unit" since "at least 1987." However, the General Counsel has cited no source in the record for this latter

[17] In continuing colloquy on the subject after I had denied the motion to reopen, counsel for the General Counsel stated "for the record" that her proffered evidence could be appropriately considered as "rebuttal" material. However, she did not attempt to identify what it was in the Respondent's trial presentation that the proffered evidence would "rebut," and I could not independently detect any basis for such a claim. Clearly, the proffered evidence, if it had been more timely discovered, would have been—and should have been—included in the General Counsel's presentation of its case-in-chief. Accordingly, I regard the belated, "rebuttal" argument as a specious one.

claim either, and my study of the record has failed to disclose any evidence tending to support this revised claim. Accordingly, I strike *this* unsupported averral from the General Counsel's brief, as well.

In addition, the General Counsel avers on brief, without citation to the record, that, "both before and after the [January 1995] purchase by the Cohan partnership, Respondent and the Union negotiated *a series of collective bargaining agreements which covered the terms and conditions of employment of the Unit employees*."[18] In fact, the evidentiary record does not reveal the existence of any "series of collective bargaining agreements" preceding the 1995–1996 agreement.[19] Rather, as I discuss next, the record contains uncontradicted testimony revealing only that the Union and the Respondent had, sometime in 1990 or 1991, negotiated and reached oral agreement on a change in the commission rate to be paid to vendors in the future.

The only competent evidence arguably suggesting that the parties had formed a collective-bargaining relationship prior to 1995 is to be found in the account of Dennis Danziger, who testified as follows about negotiating events in "1990 or 1991," during the Finan & Fitzgerald ownership era:

> A. Paul Saroff [then the Union's business representative] asked my—asked me if I would like to—if I would like to sit in on the negotiations with the Warriors, along with Bill Fritz, who [was] our Union president or vice president at the time—president, along with Paul Saroff who is the business agent[,] and the secretary, Sam Jacobs.
>
> Q. And—
>
> A. And I said yes, I would.
>
> Q. Did you actually meet with any representatives of Golden State Warriors?
>
> A. Yes, we did.
>
> Q. And where did——did you meet once or more than once?
>
> A. We met just once.
>
> Q. And where did that meeting take place?
>
> A. At the Coliseum, at the—the room right across from the Warriors offices downstairs. I believe it was the Pacific Room, what it was called at that time.
>
> Q. And who was present at that meeting for the Warriors?
>
> A. Richard Rogers was, I believe, the vice president at the time of the Warriors. And [Merchandise Manager] Jim Sweeney. I think that's what his title was, but I'm not positive.
>
> Q. And how long did this meeting last?
>
> A. Two or three hours, I think.
>
> Q. Okay. What were the subjects which were discussed at this meeting?
>
> A. Well, Jim Bagelston, I believe, also our attorney at the time, was present. Okay. That they had heard—that the Warriors had heard that the Union's contract with the [Oakland] A's [baseball franchise], our commission schedule had been reduced. That they, the Warriors, wanted a reduction from our 20 percent to a lesser percentage.
>
> MR. BOSLEY: Your Honor, I'd move to strike this as being all hearsay.
>
> JUDGE NELSON: The witness has first hand knowledge of the transactions he's describing. I overrule the objection.
>
> THE WITNESS: He asked us that they would like the same reduction as the Warriors—
>
> JUDGE NELSON: I think you meant to say as—
>
> THE WITNESS: As the A's. As the A's.
>
> Q. (By Ms. Jordan): Who was it that was speaking on behalf of the Warriors?
>
> A. Richard Rogers. Jim Sweeney didn't say anything in this meeting.
>
> Q. Okay.
>
> A. And we explained to him that circumstance—
>
> Q. Who was speaking on behalf of the Union?
>
> A. I did some—I believe I did quite a bit of speaking, along with Paul Saroff. I explained to Richard—Mr. Rogers—that the circumstances were different between baseball and basketball, that baseball was an 80 day event, 80—80 events, and [they] did much larger gross dollar volume than we did at Warriors. That we didn't feel it was justified in knocking down our percentage to that, to the 15 percent of the time.
>
> Q. Was there any—what was the result of talking about this commission rate?
>
> A. He—he agreed with that fact and he said could you—
>
> Q. Who's that?
>
> A. Mr. Rogers asked that he realized that it was different, basketball and baseball, and he said, "Could you live with 16 percent?" And after we discussed in caucus ourselves we did agree with that.
>
> Q. Do you recall when—you say that you recall if it was '90 or '91, but do you recall when during the year this particular meeting took place?
>
> A. Prior to the start of the season.
>
> Q. And approximately how long before the start of the season?
>
> A. One or two weeks, maybe three weeks before the start of the season.
>
> Q. And what was the commission rate that you had earned prior to this time?
>
> A. Twenty percent.
>
> Q. And during the next season what was the commission rate that you operated under?
>
> A. Sixteen percent.

[18] A nearly identical averral appears at p. 10 of the prosecution brief, following the statement, "The course of events in the present case is clear and undisputed." So, too, does the wholly unsupported averral that, "[I]n about 1987, Respondent recognized the Union as the collective bargaining representative of the vendors[.]"

[19] Considering all of the foregoing, I grant the Respondent's motion to strike all portions of the General Counsel's brief in which counsel has variously averred that the Respondent has recognized the Union as the vendors' representative in a certain particularly described "Unit" since "at least 1987," and/or that, since that date, the parties have negotiated a "series of collective-bargaining agreements."

Q. Were there any other issues besides commission rate which were discussed?

A. Union—Employer contribution to the pension plan.

Q. Do you remember what that discussion was?

A. No, I don't. I know we did balance it with a larger percentage. They would have to pay less of a percentage or whatever dollar figure for the pension plan.

Q. Was there any agreement reached on whether the Warriors would fund a pension program or not?

A. I don't remember how we settled on it, on that part of it, if there was.

MS. JORDAN: I have nothing further of this witness.

JUDGE NELSON: One question before Mr. Danziger's cross-exam. In seasons after the season where you described the reduction of the commission rate from 20 to 16 percent, in seasons thereafter did the commission rate stay at 16 percent?

THE WITNESS: Always at 16. Yes.

In sum, based on Danziger's descriptions, I find that in 1990 or 1991 the Respondent implicitly recognized a committee of the Union headed by Paul Saroff as the vendors' representative for purposes of negotiating the new commission rate of 16 percent, and that the Respondent reached oral agreement with the Union's committee on these terms. However, nothing in Danziger's sketchy testimony or elsewhere in the record would permit a finding that this recognition amounted to full, 9(a) recognition of the Union as the vendors' *exclusive* representative for *all* collective-bargaining purposes; much less would the hazy record allow a finding as to the intended duration of this agreement, or that it was ever reduced to writing or signed, or that any subsequent negotiations or agreements occurred between the Union and the Respondent prior to their execution of the 1995–1996 agreement.

D. Developments in the Cohan Era; a More Detailed Review

1. The balance of the 1994–1995 season

When the Cohan partnership acquired the franchise in January 1995, the Warriors were in the midst of their 1994–1995 season. The vendors, already in the Respondent's employ at this time, were unaffected by the change in ownership of the franchise; they continued to work in their accustomed manner through the balance of that season, and the Respondent admittedly made no changes in the traditional terms and conditions of their employment as described previously.

2. The 1995–1996 season

The next, 1995–1996 season came and went for the vendors according to the patterns described previously, but against a new background. Thus, in this season, the vendors worked (for the first time, so far as this record shows) under the terms of a written collective-bargaining agreement, one in which the Respondent had expressly recognized the Union in writing as the vendors' "sole and exclusive collective bargaining agent," and had unconditionally agreed to "deal with [the Union's] representatives with respect to wages, hours, working conditions, adjustment of grievances and all other pertinent matters."

The only other significant novelty was that by the end of that season in May 1996, everyone in the Respondent's operation, including the vendors, knew by virtue of widespread publicity that the Warriors would not be playing their forthcoming, 1996–1997 season home games in the Oakland Arena, due to the tear-down and rebuilding work scheduled to occur there. Everyone also knew by then that the Warriors would play the next season in the San Jose Arena. And the Union and the Respondent, at least, knew also that the Respondent's recognition of the Union as the representative of its vendors was limited to vendors employed during Warriors home games in the Oakland Arena. Finally, everyone knew that the Warriors would return to Oakland for the 1997–1998 season.

Despite this common knowledge by May 1996 of the Respondent's widely publicized intentions, there is no evidence that any discussions then took place between or among the Respondent, the Union, or the Oakland vendors, concerning the vendors' future status upon the Warriors' intended return to the Oakland Arena for the 1997–1998 season. Union Representative Arnolfo admitted that he had had no such discussion with any agent of the Respondent prior to or during the 1996–1997 season play in San Jose. The three vendor-witnesses testified commonly that the subject of their future status was not broached in any discussions between any of them and Merchandise Manager Sweeney or any other agent of the Respondent; indeed, the substance of their testimony is that the 1995–1996 season ended in May 1996 just as it had ended in previous seasons, with no explicit reference by Sweeney to future employment, much less to the terms and conditions thereof. Accordingly, I am compelled to find that the underlying question of the vendors' future status remained an entirely dormant and unspoken one until more than a year later, in mid-July 1997, as I describe in section 4.,b., infra.

3. The 1996–1997 season

The Warriors played home games in the San Jose Arena. The Respondent did not employ any vendors during these games; rather, it subcontracted the merchandise vending operation to an outside company, Airmark [or "Aramark"], Inc.

4. Developments preceding the 1997–1998 season

a. New personalities; additional background

By January 1997,[20] former Merchandise Manager Sweeney had recently left the Respondent's employ, and had been replaced in that job by his former assistant, Aaron Brady, who had previously held the title, "merchandise services coordinator." In his new job, Brady reported to Larry Hausen, the Respondent's director of Creative Services, the same person to whom Sweeney had reported before departing. In the preseason months of 1997, according to Brady, Hausen was primarily "involved in helping design the new [Oakland] arena as well as the practice facility[,]" and Brady was left with the day-to-day responsibility for managing the "merchandise department." This apparently included getting the Oakland Arena sales operation ready for the forthcoming season, and, as Brady testified, it eventually included the responsibility for recruiting, interviewing and hiring the employees who would work as vendors during the home games in the new Arena.

[20] All dates below are in 1977 unless I say otherwise.

At some point before, or during, the renovation of the Oakland Arena, the Respondent had proposed to the officials in charge of Coliseum operations (at that point, apparently, the entity in charge was a quasi-public corporation called "Oakland-Alameda County Coliseum, Inc.") that the Respondent take over the exclusive management and coordination of services for all events—not just Warriors games—to be held in the Oakland Arena once it were to reopen in November 1997. The proposal, which became the subject of some kind of memorandum of understanding between the Respondent and "Coliseum, Inc.,"[21] contemplated that the Respondent would form a subsidiary entity for this purpose, to be called "Warriors Arena Management" (WAM). The proposal was still under negotiation during the late summer and early autumn of 1997, as the Oakland Arena renovations were nearing completion. However, no final agreement on this proposal had been concluded before the 1997–1998 season began; indeed, no such final agreement had been reached 1 year later, when the trial record closed in this case. Consequently, other entities continued to be responsible for managing and servicing non-Warriors events at the Oakland Arena during that 1997–1998 season, and the Respondent performed only its more traditional function during that season, as the operator of the Warriors and as the employer of souvenir-vendors during home games.

b. The Union's initial attempts to schedule negotiations for a new agreement

On July 14, Arnolfo dispatched a letter on the Union's letterhead addressed to the Respondent's agent, Hausen, at the Respondent's administrative headquarters on 1221 Broadway, Oakland.[22] In a heading at the top of the letter, Arnolfo had typed in bold caps, "**RE: SUCCESSOR AGREEMENT**." In the letter itself, Arnolfo stated as follows:

> Local 468 represents the program and novelties vendors who work the Warriors games at the Oakland Coliseum Arena. Accordingly, we would like to discuss a successor agreement. I would appreciate it if you would contact me at your earliest convenience.

On August 13, having received no reply from Hausen or anyone else in the meantime, Arnolfo dispatched another, virtually identical letter to the same business address of the Respondent, but this time to the attention of Robin Baggett, the Respondent's general counsel. Arnolfo received no written reply from Baggett, either.[23]

Arnolfo and Baggett agree, however, that they briefly spoke to one another by telephone sometime later in August or early September. (Although Baggett dimly recalled that he had two, nearly identical phone conversations with Arnolfo in this period, I credit Arnolfo's more particular recollection that there was only one conversation between them where the subjects outlined below were discussed.[24]) Who called whom, and what, exactly, was said in this conversation are disputed matters. However, both witnesses agree that a main subject of their brief discussion was the status of the Respondent's still-ongoing negotiations with Coliseum officials over the Respondent's proposal to take over the management of all events to be held in the Oakland Arena. They further agree that Baggett told Arnolfo that these negotiations were still going on, and that no final agreement had been concluded.

The only arguably material conflict between Baggett's and Arnolfo's version of the conversation centers on whether or not the two men explicitly discussed the Union's wish to begin negotiating a new agreement to cover the vendors during the forthcoming season. I am not persuaded that this conflict requires a resolution. The complaint does not charge the Respondent with having unlawfully stalled in responding to bargaining requests by the Union, and everyone agrees that the Union and the Respondent eventually corresponded in writing on the subject in October, leading to the Respondent's admitted October 23 refusal to recognize or bargain with the Union, as further described below. However, for the benefit of any reviewing body that might judge that the conflict in testimony is material to the resolution of issues raised by the complaint, I record next my findings and observations regarding key points of dispute.

Arnolfo's version of the conversation was summary in character, and one-sided to boot, as if Baggett were the only party who had said anything. Thus: "Mr. Baggett acknowledged receipt of my letter. He indicated that at that time the Warriors were involved in negotiations for the exclusive control of the new arena, and once that had been concluded and he presumed, at that point, that they would be concluded shortly, he would contact me again for the purpose of arranging a meeting."

Baggett denied nearly all the particulars of Arnolfo's account; he testified, in substance, that he had never personally received or seen Arnolfo's August 13 letter prior to this conver-

[21] The Respondent's witnesses variously referred to this "MOU," and, on brief, the Respondent invokes some of its purported provisions in partial explanation of its vendor-recruitment efforts for the 1997–1998 season. However, the MOU is not of record; accordingly, I must ignore the Respondent's references on brief to certain of its provisions as unproven; indeed, I can make no findings as to any of its provisions.

[22] The Respondent claims to have been unaware of having received this letter, and questions the adequacy of proof of delivery thereof. Arnolfo's testimony that he mailed the letter to the address indicated establishes a presumption that the letter was received by the Respondent at that address in due course. A general denial of unawareness does not rebut the presumption. I note also that the Respondent admittedly received another letter sent by Arnolfo to the same address (the October 18 letter, infra). Accordingly, I find that the Respondent did, in fact, receive Arnolfo's July 14 letter in due course. What happened to it after receipt is a matter for conjecture.

[23] Baggett testified that he never saw this August 13 letter personally, and that, after later seeing a reference to it in Arnolfo's October 18 letter, infra, he made an unsuccessful search for it in the "Warriors' files" he maintained in his law office. For reasons previously noted, I find that the August 13 letter was received by the Respondent at the administrative headquarters address indicated on the letter, even if it never came to Baggett's personal attention, and even if it never found its way into the files that Baggett later searched.

[24] Arnolfo, called during the General Counsel's rebuttal presentation, testified convincingly that although he *did* receive a second call from Baggett, Baggett explained in this call that he had not intended to call Arnolfo, but rather, to return a call from someone else with a similar name, to set up a golf match. Arnolfo also testified convincingly that this was the extent of the "second" conversation, and that nothing of substance was discussed between the two before they hung up.

sation, that he didn't tell Arnolfo that he had received it, and that he never promised to get back to Arnolfo for the purpose of arranging a meeting with him. To the contrary, Baggett insisted that the *only* subject raised by Arnolfo and discussed between them was the status of the Respondent's negotiations with the Coliseum authorities, i.e., that Arnolfo merely asked about the status of those negotiations and that Baggett told him they were still going on. Baggett emphasized in this regard that he is generally unfamiliar with and uninvolved in matters of law and practice in the labor-relations sphere,[25] that he refers all such matters to outside counsel in the Thelen firm (particularly to Attorney Kent Jonas in that firm), and, therefore, that he would not have told Arnolfo that he would personally call Arnolfo back for the purpose of setting up a meeting with him. However, Baggett eventually acknowledged during cross-examination that Arnolfo had introduced himself as the Union's representative at the beginning of the conversation, and he further volunteered during examination from the bench that he somehow had formed the impression that Arnolfo was "trying to figure out who he's going to be dealing with, his union's going to be dealing with."

This latter acknowledgment persuades me that Arnolfo's call had at least put Baggett on notice of the Union's wish to begin contract negotiations on behalf of the vendors. Moreover, it strikes me as probable in the circumstances that Baggett, recognizing this, would have agreed in some manner to get back to Arnolfo at some future point. However, I am not persuaded that Baggett agreed to get back to Arnolfo for the specific purpose of setting up a collective-bargaining meeting with the Union, as distinguished from expressing a generalized assurance that he would inform Arnolfo when and if the Respondent's negotiations with Coliseum authorities had resulted in a definitive agreement. My doubts concerning the latter are influenced in part by Baggett's plausible testimony that he generally referred labor-relations matters to outside counsel (even though, as previously noted, he gets personally involved in matters affecting the high-stakes labor relationship between the NBA owners and the NBA Players Association). My doubts are enhanced by my impression that Arnolfo was straining his genuine memory when he claimed to recall an express promise from Baggett to get back on the matter of scheduling negotiations with the Union. But my doubts trace mainly from Arnolfo's and Baggett's apparent common recognition during their conversation that any collective-bargaining negotiations between the Union and the Respondent should best await the outcome of the Respondent's negotiations with the Coliseum authorities, at which time it would become more clear to both parties exactly whom the Union might be dealing with, if anyone, and concerning exactly which group of employees. Accordingly, I would find that if Baggett said anything about getting back to Arnolfo, it was in the nature of a generalized assurance that he would keep Arnolfo apprised of any change in the status of the negotiations with Coliseum authorities, but not a promise to get back for the purpose of scheduling collective bargaining.

[25] However, Baggett implicitly contradicted such assertions, or at least significantly qualified them, when he admitted elsewhere that he "deal[s] . . . a lot" with the "NBA Players Association."

In any event, Baggett did not get back to Arnolfo. Rather, as I find below, it was not until late October, more than a month after the incident described next, that yet another letter from Arnolfo to Baggett triggered a written reply—not from Baggett, however, but from Attorney Jonas.

c. Brady's late August conversation with vendor Jacobs

Jacobs had a concession to sell souvenirs at college football games held at the Stanford University stadium, in Palo Alto. In anticipation of the start of the Stanford football season in September, Jacobs had asked Brady if Jacobs could acquire for his Stanford operation the portable vending stands no longer to be used by the Respondent in the renovated Oakland Arena.[26] They had more than one conversation on this subject in August before they struck a deal.[27] Jacobs and Brady agree that in one such conversation, the two discussed Brady's (wholly misinformed) belief that some kind of recent negotiations had taken place between the Union and the Respondent in which the Union had demanded an increase in the commission rate to "35 percent." (Brady claims not to recall how or from whom he first heard this rumor, but everyone agrees that it was false.) They disagree, however, about certain features of the conversation. Specifically, Jacobs testified—and Brady denied—that Brady stated, in substance, that because of the Union's supposed demand for a 35-percent commission, the past-season vendors would not be recalled to work the NBA season home games in the new Arena.[28] On this point of conflict, I credit Jacobs' version,[29] and specifically, his testimony as follows:

[26] It is undisputed that one of the design refinements for the remodeled Oakland Arena was the construction of permanent vending stands in the Arena, which made obsolete the portable vending stands used in prior seasons by the Respondent's vendors.

[27] For the timing of these discussions, I rely on Jacobs, who testified convincingly that these conversations had to have occurred sometime prior to the start, in September, of the Stanford football season, and that the conversation most in question must have occurred sometime around the third week of August.

[28] The Respondent has moved to strike the General Counsel's averral on brief (p. 6, fn. 6) that "Brady. . . gave the same account of his conversation with Jacobs" that Jacobs gave. The General Counsel cites "Tr. 268" (Brady's testimony generally confirming that he and Jacobs talked about the imagined union demand for a "35-percent" commission). However, Brady specifically denied having said "anything at all about whether the vendors who had worked previously for the Warriors in the arena would be coming back to work for the 1997[–]1998 season." Accordingly, I grant the Respondent's motion to strike in this respect, as well.

[29] Brady struck me as an uncomfortable and sometimes evasive witness when he purported to describe the transaction in question. Moreover, although denying on direct examination by the Respondent's counsel that he had said anything to Jacobs about the recall of past-season vendors, he eventually acknowledged during examination from the bench that he had already formed a personal *opinion* on the subject at the time he spoke to Jacobs—that the vendors would *not be* recalled because of their (supposed) demand for a 35-percent commission. Thus,

> Q. All right. Your prior opinion was if that's what they're going for, they're not going to get it, and they're not going to come back; is that a fair way of putting it?
>
> A. Sure, yes.

> A. I believe I probably said, "Do you have any idea if we're coming back?" And I think it was on our last conversation when we firmed up the deal to buy the stands, I think I asked Aaron, "Have you heard anything?" And his response was that, "You're not going to be coming back here." The Union or the attorney, I'm not sure which particular word he used. But I remember quite vividly he said, asked for an outrageous sum of 35 percent.
>
> Q. Okay. Did he say anything else?
>
> A. No. I said, "Really." I said, "Okay. Thanks for the stands."

At some later point, Jacobs told Arnolfo what Brady had said, and Arnolfo confirmed that the Union had made no demand for a 35-percent commission, indeed that the Union had not yet begun negotiations with the Respondent.

Some final observations about this transaction: First, Brady's statements to Jacobs, as found above, are not alleged in the complaint nor argued in the prosecution brief as being unlawfully coercive in themselves. Rather, consistent with statements made by counsel for the General Counsel in an all-party telephone conference I conducted before the trial opened, the General Counsel argues only that Brady's statements are evidence of "animus" relevant to the alleged 8(a)(3) violations, i.e., the failure to recall past-season vendors for the 1997–1998 season. Considering that the General Counsel has effectively chosen not to seek a finding that Brady's statement violated the Act, I will not address that question, even though the transaction was fully litigated.[30]

Second, Arnolfo testified that Jacobs had told Arnolfo something about his conversation with Brady that Jacobs himself failed to note in his testimonial account, supra—that Brady had said that the Respondent "would be hiring vendors for $10 per hour plus a bonus." (Jacobs did not describe in any detail what he had reported to Arnolfo.) Under the rule against hearsay, Arnolfo's testimony was clearly inadmissible to prove that Jacob's out-of-court assertions to him about the underlying conversation were true, i.e., that Brady had, in fact, said the things that Jacobs reported to Arnolfo. But Arnolfo's testimony about the contents of Jacobs' report *was* admissible for a different purpose—to explain why Arnolfo, in his October 18 letter to Baggett, infra, accused Brady of having made the latter, "$10 per hour plus bonus" statement. In fact, counsel for the General Counsel expressly tendered Arnolfo's testimony for this narrow purpose, and the testimony was received strictly for this purpose, but not for any hearsay purpose. Despite this, counsel for the General Counsel seems now to have forgotten these distinctions when, on brief, she relies on *Arnolfo's* hearsay as evidence of what Brady actually said to Jacobs in the underlying conversation: Thus, she states (pp.14–15), "Brady told the employee [Jacobs] that . . . new employees would be paid $10 per hour with a bonus plan." Accordingly, I strike *this* unsupported averral, as well.

d. October 23; the Respondent refuses the Union's latest request to bargain

On October 18, Arnolfo dispatched yet another letter to Baggett at the same address as his previous correspondence. This letter again bore the subject caption, "**RE: SUCCESSOR AGREEMENT**." In this letter, Arnolfo first adverted to his previous, August 13 letter to Baggett, and to their previous telephone conversation. Arnolfo then noted that "the Warriors home opener is less than three (3) weeks away, and time is somewhat of the essence[,]" and that inquiries from the Union's members about the "status of contract negotiations" had "prompted" Arnolfo "to once again contact" Baggett. Arnolfo then described the "rumor" that had come to his attention via Jacobs—that "an individual who has at least purported himself to be employed by your organization" [referring to Brady] had made certain statements to "some of [the Union's] members" falsely suggesting, inter alia, that the "Union's attorney has already met with Warriors representatives and . . . has demanded 35% in sales commission[,]" and, that "this has caused the Warriors to search for vendors outside the Union and that people were being hired for ten dollars ($10.00) per hour." Arnolfo concluded the letter with these words:

> We both know that the first rumor is false, and I certainly hope that the second one is also.
>
> I would appreciate it if you would contact me at your earliest convenience in order to quell these rumors, as well as to commence contract negotiations.

Baggett admittedly received this letter, and forwarded it to attorney Jonas for reply

Jonas replied by letter dated October 23. (In this letter, Jonas spoke nominally for "WAM," the subsidiary entity the Respondent had formed in anticipation of a possible takeover of the management of all events at the Oakland Arena. However, the Respondent's counsel acknowledged during the trial that Jonas was necessarily speaking for the Respondent, as well.) Jonas first advised Arnolfo that "it is presently contemplated that the [Oakland Arena] will be operated until January 1, 1998 by Oakland Alameda County Coliseum, Inc. ('Coliseum, Inc.')[,]" but that "we expect it will be operated after that date by WAM." He added, however, that "no definitive agreement on this subject has yet been signed." (In fact, as previously noted, no such agreement had been reached even by October–November 1998, and therefore "Coliseum, Inc." remained in overall charge of Arena management throughout the 1997–1998 season.) Jonas then acknowledged that the Respondent "had a collective bargaining agreement with your Union which expired August 31, 1996," adding that the Warriors had played their 1996–1997 season home games in San Jose, "where they contracted out the sale of merchandise to a vendor which, as we understand it, did not have a collective-bargaining agreement with your Union." Jonas went on to describe "WAM's" present plans and already-implemented arrangements for hiring vendors for work in the Oakland Arena during the 1997–1998 season, in pertinent part as follows:

Accordingly, in addition to considerations of demeanor, I find it probable that Brady would have delivered this very opinion to Jacobs in the course of discussing the imagined union demands for a 35-percent commission.

[30] See, e.g., *Maintenance Service Corp.*, 275 NLRB 1422, 1425–1426 (1985).

> WAM will employ the individuals who sell merchandise in the Arena during the upcoming Warriors' season and at other Arena events. To assure the highest quality of service to patrons of these events, and because it has been more than a year since the Warriors employed anyone to perform similar work, WAM has concluded that it is best to go though a full hiring process. Accordingly, as your letter suggest, WAM has advertised for merchandise vendors to work at the Arena. It has focused its recruitment efforts through the Oakland Private Industry Council and through church groups in Oakland. . . . WAM will, of course, consider applications from individuals who formerly worked at the Arena as vendors. Any such individuals . . . should contact Aaron Brady at 510/986-2200.

Then, in the concluding passages, came Jonas's answer to Arnolfo's request for bargaining, as follows:

> With this factual background, WAM does not believe that it is required to, or even can, bargain with your Union. Your Union has not had a contract to represent employees working at the Arena for more than one year and does not presently represent any vendors working there; in fact, there are no such employees at this time. We further understand that your Union has never had a collective bargaining agreement with Coliseum, Inc. Under these circumstances, we believe not only that there is no legal obligation to bargain with your Union, but also that if there were such bargaining any resultant contract would likely be considered an illegal pre-hire agreement.
>
> Please direct any future communications regarding these issues to me rather than to Mr. Baggett.

5. The Respondent's hiring process

Piecing together the testimonial descriptions given by Brady, who was responsible for interviewing and hiring the new vendors, and by Robert Rowell, the Respondent's vice president of business operations, I find as follows: The Respondent's recruitment of vendors for Warriors home games at the Oakland Arena began, in early October, with the mailing of flyers to as many as 30 different local organizations or entities that might serve as potential sources of new vendor-employees. (As Brady recalled it, the organizations targeted by the flyers included "churches," "college campuses," and "the unemployment office.") The flyers advertised for "Game Night Mercha[n]dise Cashier[s]," to be paid "$10.00/Hr. plus sales performance bonuses,"[31] and stated there would be "thirty positions available," each position involving a fixed, 6-hour shift during game nights, starting "two and a half hours before game time through an hour and a half past game time." Further, although the flyers indicated that "Cash register and/or retail experience [would be] a plus," no such flyers were sent to the Union, whose membership was clearly composed of persons possessing such experience, nor to any of the vendors the Respondent had employed in prior seasons to do the work now being advertised in the flyers.

Following a series of interviews that occupied most of the balance of October, the Respondent hired about 22–24 new recruits, effective November 1, to work the vending stands for the opening home game of the 1997–1998 season.[32] The Respondent also hired several more employees at uncertain points, bringing its overall complement of vendors to about 30. However, not all 30 worked every home game, nor were they expected to do so, because some Warriors games (Rowell cited games against "Denver" or "Vancouver" as examples) would, predictably, fail to draw "sellout" crowds, and thus would require fewer vendors.

Analysis; Supplemental Findings; Conclusions of Law

I. 8(a)(5) COUNTS

A. Duty to Recognize and Bargain

The record shows that the Respondent refused to recognize or bargain with the Union as the exclusive representative of the vendors it hired to work in the Oakland Arena during the 1997–1998 season. The refusal may have been implicit in the Respondent's failure to respond to the Union's July 14 and August 13 letters seeking bargaining, supra; in any case the refusal became manifest when, on October 23, attorney Jonas wrote to the Union's Arnolfo, stating the Respondent's position that it had "no legal obligation to bargain with your Union," and could not do so because "any resultant contract would likely be considered an illegal pre-hire agreement."

The question, then, is whether the Respondent was correct in claiming not only that it had no legal obligation to bargain, but that to do so would likely be unlawful. For reasons discussed below, I judge that neither of these claims enjoys any substantial legal support, indeed, that the applicable caselaw requires a finding that the Respondent owed a duty to recognize and bargain with the Union at all times material to the complaint, i.e., in and after October 1997.

To find that the Respondent owed recognitional and bargaining duties to the Union at material times necessarily requires a finding at the threshold that the Union had by then established itself as the exclusive representative of the Oakland vendors unit within the meaning of Section 9(a) of the Act. The General Counsel alleged, but failed to prove, that the Respondent and the Union had been parties to a full, 9(a) relationship "since at least 1960"; the prosecution similarly failed to introduce any evidentiary support even for the General Counsel's highly trimmed claim on brief that such a 9(a) relationship has been in existence "since at least 1987." These efforts were not just unsuccessful; they were entirely needless: It doesn't matter at all when the 9(a) relationship *first* may have come into existence; all that was required for threshold purposes was evidence that a 9(a) relationship had come into existence at *some* identifiable point before the Respondent took complained-of actions in October–November 1997. And on this point there can be no dispute: Such a relationship plainly came into existence, if it

[31] Absent any evidence to the contrary, I presume that the advertised, "$10.00/Hr. plus sales performance bonuses" became the actual compensation scheme implemented by the Respondent after hiring the new vendors.

[32] The Respondent had also hired five additional employees in this period to work at the Respondent's recently opened retail store in the Oakland City Center.

did not exist already, when the Respondent entered into the 1995–1996 agreement with the Union, in which it expressly recognized the Union as the Oakland Arena vendors' "sole and exclusive collective bargaining agent," and unconditionally agreed to "deal with [the Union's] representatives with respect to wages, hours, working conditions, adjustment of grievances and all other pertinent matters.

The recognition language in the 1995–1996 agreement clearly evidenced the parties' mutual intention to form a "full" 9(a) relationship,[33] that is, a relationship in which the Union was acknowledged to be the "exclusive representative," "designated or selected by a majority" of the vendors of Warriors merchandise in the Oakland Arena, with the full panoply of legal protections and obligations associated with such exclusive representative status. Moreover, when the Respondent's 9(a) recognition of the Union was not challenged within the six-months statutory limitations period by a charge or a petition calling it into legal question, the Union's 9(a) status became perfected in critically important ways: First, the recognition became immune from attack on the ground that the Union had not, in fact, been designated by a majority of the Oakland vendors at the time of recognition.[34] Perhaps more important for our purposes, the Union became the beneficiary of a legal *presumption* that it continued to occupy majority representative status thereafter; indeed, under established principles governing nonconstruction labor relationships reviewed by the Board in *Deklewa*,[35] the Union's majority status was not subject to *any* challenge during the term of the 1995–1996 agreement, and even after the expiration of that agreement, the presumption of its majority status continued, but became a "rebuttable" one.[36]

Clearly, therefore, at all times after the expiration of the 1995–1996 agreement, the Union's status as the Section 9(a) majority representative of the Oakland vendors can be presumed in law to have continued, with the Respondent bearing the burden of overcoming this presumption to justify its refusal to recognize the Union in October 1997 and thereafter. The most commonly recognized means by which an employer may justify a withdrawal of recognition from the incumbent 9(a) union is to establish either that the union did not, "in fact," enjoy majority support in the bargaining unit at the time of withdrawal of recognition, or that the employer had a "good-faith doubt" of that majority support based on "objective considerations."[37] While the Respondent does challenge the Union's status as the majority representative of the employees it actually hired for the 1997–1998 season, this challenge is made indirectly, and then only as an adjunct to its more fundamental argument that the "hiatus" in Oakland Arena operations associated with the Warriors' play in San Jose during the 1996–1997 season had the effect of extinguishing not only its continuing recognitional and bargaining duties to the Union, but of extinguishing the historical bargaining unit itself. For reasons discussed next, I judge that the Respondent's claims as to the extinguishing significance of the one-season hiatus cannot be sustained.

A lengthy and "indefinite" shutdown of a unionized employer's business operation due to economic hardship *may* so affect the "continuity" of the bargaining relationship as to extinguish that relationship; and, if the bargaining relationship has thus been extinguished, this *will* leave the employer free, upon resumption of the operation, to act unilaterally when it comes to setting the initial terms and conditions of employment in the resumed operation. *Sterling Processing Corp.,* 291 NLRB 208, 209–210 (1988). (Even then, however, the Board will treat the formerly existing bargaining relationship as having been "revived" if the employer's resumed operation is substantially the same as its preshutdown operation, *and* the employer ends up hiring enough workers from the preshutdown operation to constitute a majority of its new work force. Id. at 210–211.)

By contrast, if the hiatus was intended from the start as merely a "temporary" one, even a lengthy operational hiatus will not have the effect of extinguishing an existing bargaining relationship; and this is so even if, upon resumption of the operation, the employer's work force consists overwhelmingly of employees who had not worked in the preshutdown operation. *El Torito-La Fiesta Restaurants*, 295 NLRB 493, 494–496 (1989), distinguishing *Sterling Processing,* supra*,* on the ground that, there, the employer had "closed its facility indefinitely," leaving the employees with no "reasonable expectancy of reemployment." Id*.,* at 495 fn. 4.

Not surprisingly, the Respondent sees this case as controlled by the Board's holding in *Sterling Processing,* whereas the General Counsel finds *El Torito* to be the more appealing precedent. My own assessment is that neither case presents facts on all fours with this one, but that the facts herein are readily distinguishable from those driving the holding in *Sterling Processing,* and that the Board's reasoning in *El Torito,* and especially the distinctions drawn in that case, must govern my analysis of the facts herein.

In *El Torito,* the Board was faced on remand from the Ninth Circuit with the charge of reconciling its precedents in the area of "contract bar" with other precedents having to do more gen-

[33] See generally *Casale Industries*, 311 NLRB 951 (1993). See also, e.g., *MFP Fire Protection, Inc.,* 318 NLRB 840 (1995), enfd. 101 F.3d 1341 (10th Cir. 1996).

[34] Thus, contrary to the Respondent's inconclusive suggestions, the law is clear that, "if an employer grants Section 9 recognition to a union and more than 6 months elapse, the Board will not entertain a claim that majority status was lacking at the time of recognition. A contrary rule would mean that longstanding relationships would be vulnerable to attack, and stability in labor relations would be undermined." *Casale Industries,* supra at 952–953 (fns. omitted).

[35] *John Deklewa & Sons,* 282 NLRB 1375 (1987), enfd. sub nom. *Iron Workers Local 3 v. NLRB,* 843 F.2d 770 (3d Cir. 1988), cert. denied 488 U.S. 889 (1988).

[36] See 282 NLRB at 1386, fn. 48:

> Outside the construction industry, an employer cannot lawfully withdraw recognition from an incumbent union unless it can demonstrate an actual loss of majority status or sufficient objective considerations to establish a reasonable good-faith doubt as to the union's majority status. *Terrell Machine Co.*, 173 NLRB 1480 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970). Even if an employer can meet that burden, however, it cannot withdraw recognition during the term of a valid collective-bargaining agreement. *Hexton Furniture Co.*, 111 NLRB 342 (1955).

[37] *Deklewa,* supra at fn. 48, and authorities cited. See also, e.g., *NLRB v. Curtin Matheson Scientific, Inc.,* 494 U.S. 775, 779 (1996).

erally with presumptions of an incumbent union's continuing majority status during a business shutdown. (In the underlying *El Torito* case,[38] the Board had found that the employer, upon resumption of restaurant operations with mostly new employees following a 14-month shutdown for major remodeling, had unlawfully refused to recognize the union that had represented its pre-shutdown work force, and had unlawfully refused to apply the preexisting union contract, which was still in effect.) In its discussion on remand, the Board distilled from a review of prior decisions an analytical "principle" that emphasized the distinction between an "indefinite" shutdown and a "temporary" one as the "key factor" in determining whether the bargaining relationship (including the union contract, if it were still effective) survived the shutdown. 295 NLRB 494. Thus, as the Board elaborated (id. at 494–495*)*:

> An indefinite shutdown indicates that employees have no reasonable expectation of reemployment and that the continuity of the bargaining unit no longer exists.
>
> . . . .
>
> Here [by contrast], the . . . employees were told that they would be recalled when the restaurant reopened[.]. . . All parties knew about the reopening, and the Respondent's shutdown of operations was only temporary. While the remodeling did not proceed as quickly as originally estimated, there was no doubt that the Respondent would ultimately reopen and unit work would once again become available. Thus, the employees had a reasonable expectation of reemployment and the bargaining unit therefore remained intact.

Significantly, moreover, the *El Torito* Board found it appropriate for purposes of reaffirming its underlying decision to draw an "analogy" between the "temporary" shutdown presented in that case, and practices in a unionized "seasonal" industry, where "the pattern of layoff and recall repeats itself year after year," and the "collective-bargaining agreement remains in effect during the ["off-season"] hiatus."

Clearly, the teachings of *El Torito* have prima facie applicability to this case, even if the facts of that case do not in all respects match those of this case. Relatedly, I find that *Sterling Processing* is readily distinguishable from this case for essentially the same reasons the Board noted in *El Torito.* Thus, in *Sterling Processing* the Board found that the employer closed its poultry processing plant due to economic hardship, and "discharged" the union-represented plant employees in the process (291 NLRB at 210), further advising the union and the employees that the shutdown would endure "indefinitely," i.e., "until further notice." Id. at 209. These combined circumstances caused the Board to conclude that, during the 19-month period of hiatus before the employer reopened the plant, "there were no employees. The entire prehiatus work force had been discharged or laid off with no reasonable expectation of recall." Id. at 210.

Here, by contrast, the one-season hiatus in the Warriors' play in the Oakland Arena had nothing to do with economic hardship, just a need to remodel the Oakland home-court facility. Thus, unlike shutdowns occasioned by economic hardship, where the possibility or timing of any resumption is typically "indefinite" and usually beyond the employer's ability to control, the hiatus in this case was plainly intended as "temporary." Moreover, just as in unionized seasonal industries elsewhere, here the seasonal layoff of the Respondent's vendors did not historically betoken a discharge, merely a temporary layoff during the off-season, with recall of them for unit work in the following season an established part of the historical "arrangement" that the Respondent admittedly "memorialized" when it executed the 1995–1996 agreement with the Union. While it is true that the particular hiatus in question here, encompassing the entire 1996–1997 season, represented a departure from historical patterns, it was no more an "indefinite" one for all that; rather, everyone knew that the Warriors would return to the Oakland Arena for home-court play in the 1997–1998 season. Thus, just as in *El Torito, supra,* "there was no doubt that the Respondent would ultimately reopen" its vending operation at the Oakland Arena, and "[t]hus the [Oakland vendors] had a reasonable expectation of reemployment and the bargaining unit remained intact," notwithstanding the one-season sojourn to San Jose.

It is also true that here, unlike in *El Torito,* there is no evidence that the Respondent affirmatively assured the Oakland vendors prior to the hiatus that they would be recalled when operations resumed at the Oakland Arena in the 1997–1998 season. However, neither were they told otherwise. Certainly, there is not the slightest evidence that the Respondent "discharged" them, or gave any other indication to them prior to (or after) the end of the 1995–1996 season that their historical employment relationship with the Respondent would be treated as ending coterminous with the end of that season. Indeed, consistent with the broader reasoning of *El Torito,* the "temporary" nature of the hiatus was alone enough to warrant the conclusion that the Oakland vendors employed in the 1995–1996 season had a "reasonable expectancy of reemployment" when the Respondent resumed operations in the Oakland Arena.

Nor does it affect the continuity-of-representation analysis that the Respondent hired new vending employees for the 1997–1998 home games at the Oakland Arena, employees who had never affirmatively indicated their wish to be represented by the Union. The same pattern existed in *El Torito,* without impact on the presumption that the union continued as the unit employees' exclusive, 9(a) representative. Thus, here, as in *El Torito,* "the mere occurrence of workforce expansion and turnover does not rebut the presumption of continuing majority status. 295 NLRB at 494, and authorities cited.[39]

Accordingly, I conclude that the temporary, one-season hiatus did not extinguish nor materially disturb the Respondent's

[38] 284 NLRB 518 (1987).

[39] Wholly apart from the evident applicability of this reasoning to the instant case, the existence of a brand-new work force in the 1997–1998 season would still be a spurious basis for treating the preexisting bargaining relationship in this case as having become extinguished. This is because, as I find, (a) the hiring process resulting in this new complement constituted a unilateral departure from the Respondent's past practice of recalling past-season vendors, and thus violated Sec. 8(a)(5); and (b) the hiring process—and especially the bypassing of past-season vendors—was in any case influenced by antiunion considerations, and thus independently violated Sec. 8(a)(3).

preexisting 9(a) relationship with the Union as the representative of its vendors employed during Warriors home games at the Oakland Arena. It therefore follows as a matter of law that when the Respondent nevertheless refused to recognize the Union upon hiring for and resuming employee-vending operations in the Oakland Arena, it violated Section 8(a)(5).

B. Unilateral Changes

The record shows that the Respondent departed from its historical practice of recalling past-season vendors for new-season work at the Oakland Arena, and instead focused its recruitment efforts for the 1997–1998 season exclusively on sources other than the Union or its past-season vendors. The record shows that when the Respondent advertised for and hired vendors for the 1997–1998 season, it departed from its previously-established manner of compensating vendors through an agreed-on commission rate and instead implemented an hourly-rate-plus-sales-bonus scheme. Both actions were taken unilaterally, despite the Union's continuing status as the 9(a) representative of the Oakland vendors, and in the face of the Union's requests, beginning as early as July 14, 1997, to meet and bargain over such basic terms and conditions of employment in the unit.

Because the Union continued to be the 9(a) representative of the vendors unit, and because these changes clearly affected established terms and conditions of employment in the unit, they were "mandatory bargaining subjects." *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958). Thus, the Respondent was not free to act unilaterally with respect to these subjects; rather, it owed a duty to notify the Union in advance of its intended changes, and, if the Union requested bargaining, to refrain from implementing such changes unless and until it had bargained in good faith with the Union to agreement or impasse. *NLRB v. Katz*, 369 U.S. 736 (1961). Neither would it matter, contrary to the Respondent's suggestions, that the established conditions that were changed may have first become established at a time before the Union became the employees' Section 9(a) representative. For the "general rule [is] that an employer must bargain about changes in terms and conditions of employment *regardless of how those terms came to be initially established*." *Indiana & Michigan Electric Co.*, 284 NLRB 53, 54 (1987); my emphasis.[40]

Accordingly, I conclude as a matter of law that when the Respondent unilaterally departed from the established vendor recall procedures and unilaterally changed the manner of compensating the vendors it did hire, the Respondent in each case further violated Section 8(a)(5).

II. 8(a)(3) COUNT

A. Wright Line Analysis

The complaint alleges not only that the Respondent's failure to recall past-season vendors was an unlawful unilateral change, but that the Respondent's bypassing of these vendors during its recruitment campaign was independently motivated by unlawfully discriminatory considerations. This count requires an analysis under *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also, *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), affirming *Wright Line's* analytical scheme. In *Wright Line,* the Board announced that it would,

> [H]enceforth employ the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, we shall require that the General Counsel make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In this regard, although the Board's phrase, prima facie *showing,* might imply, standing alone, that the General Counsel's burden is merely one of "coming forward" in its case-in-chief with *some* evidence pointing in the direction of bad motive (and has drawn criticism in some circuits for this reason[41]), the Board elsewhere made it clear in *Wright Line* itself that the General Counsel's burden is actually one that remains with the prosecution throughout the trial, and does not shift.[42] The Supreme Court likewise so held in approving *Wright Line's* analytical scheme in *Transportation Management,* observing in the process that the General Counsel's burden requires proof of the "motivating-factor" element by a "preponderance" of the evidence in the record as a whole.[43] In short, the General Counsel's burden in these cases is an ultimate burden of "persuasion" as to the "motivating-factor" element, not merely a burden of "coming forward."[44]

Employing the required analysis under *Wright Line,* I find substantial merit to the 8(a)(3) count in the complaint. As reviewed below, a preponderance of the credible evidence in the record as whole clearly indicates that the past-season vendors' affiliation with the Union, and/or the Respondent's wish to avoid unwanted bargaining obligations should it recall those vendors, figured strongly in the Respondent's motivations for failing to recall them, or even to recruit them.

First, it clearly appears that the Respondent's failure to seek out past-season vendors involved a pointed and conscious "by-

[40] In the cited case, the Board acknowledged the existence of only two exceptions to the "general rule": (a) that contractual obligations to take grievances to final and binding arbitration will expire when the contract expires; and (b) that contractual union security and dues checkoff obligations will likewise expire when the contract expires. 284 NLRB at 54, 55.

[41] See, e.g., *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996), discussing the D.C. Circuit's 1995 slip opinion in *Southwest Merchandising Corp. v. NLRB,* and the Supreme Court's decision in *Office of Workers' Compensation v. Greenwich Collieries,* 512 U.S. 267 (1994). See also *Schaeff Inc. v. NLRB,* 113 F.3d 264 (D.C. Cir. 1997), where the Circuit Court recently suggested that the practical effect of *Greenwich Collieries,* supra*,* may be no more than the abandonment of the expression "prima facie case" to describe the General Counsel's burden under *Wright Line.* 113 F.3d at 266 fn. 5.

[42] 251 NLRB at 1088 fn 11.

[43] *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, 398-99 (1983).

[44] *Manno Electric,* supra at fn. 12, reaffirming this understanding.

passing" of them. Thus, although their prior souvenir-vending experience could be expected to make the past-season vendors prime candidates for the Respondent's recruitment efforts (and prior experience was admittedly seen by the Respondent as a "plus"), the Respondent did not include the past-season vendors, nor their union, on the extensive list of organizations and other entities to which the Respondent *did* choose to mail its recruitment flyers. Second, of course, is the fact that the Respondent declared its unwillingness to recognize, meet or bargain with the Union when it finally replied to the Union's ongoing requests for new-contract bargaining. Third are the indications from Brady's late August conversation with vendor Jacobs, supra, that the Union's (imagined) demands for a "35 percent commission" would doom any chance of recall for the past-season vendors. (Nor does it matter for these purposes that Brady's premise was a mistaken one; the point is, Brady, who was in charge of hiring vendors for the 1997–1998 season, *believed* that the Union had made or would make such demands, and invoked this as a reason for declaring to Jacobs that the past-season vendors would be personae non gratae when it came to filling jobs in the resumed operation.)

Finally, and perhaps sufficient in itself, are the reasonable inferences about the Respondent's motivations that can be drawn from the testimony of its vice president for business operations, Rowell, in response to questioning by the Respondent's trial counsel, on direct examination, as follows:

> Q. (By Mr. Bosley): Mr. Rowell, why did you not simply automatically rehire all of the vendors who had worked for the Warriors in the '9[5]–'96 season to work for the Warriors at the new arena?
>
> A. Kind of two fold. First of all, I didn't know who they were. And second of all, we had no obligation to bargain with—with a union to hire those vendors.

These explanations struck me as both disingenuous and evasive, but ultimately revealing of an apparent concern that clearly had nothing to do with the past-season vendors' experience or qualifications for the job.

Thus, starting with Rowell's claim that he "didn't know who they were," I note first that Rowell's subordinate, Brady, clearly knew who "they" were, because Brady had worked (under Sweeney) with the vendors employed during the 1995–1996 season. Clearly, Rowell could have learned those vendors' identities from Brady, had he wanted to. Moreover, Rowell elsewhere admitted that he had "spoke[n] with some of the [vendor] employees in the '95–'96 season." And he further admitted his knowledge of past-season vendor complements when he unhesitatingly answered that the complement of about 30 new vendors used to the full during sellout games in the 1997–1998 season represented an approximate "doubl[ing]" of the vendor complement used during the 1995–1996 season. Accordingly, this explanation is so inherently lame that it suggests concealment of an ulterior reason, which leads me to a related observation about the balance of Rowell's answer: Rowell's (legally conclusionary) explanation that "we had no obligation to bargain with a union to hire those vendors" strikes me as an oddly nonresponsive or indirect way of replying to the question he was invited to answer—"Why did you not simply automatically rehire all of the [past-season] vendors?" The only way I can reconcile the seeming lack of thematic correspondence between the question and the answer is to infer that, according to Rowell's way of thinking, there *was* a thematic correspondence between the two, i.e., that Rowell believed at the time such hiring decisions were made that to "automatically rehire" past-season vendors would necessarily entail "bargaining" with the Union, something that the Respondent evidently did not want to do.

In sum, recapitulated in *Wright Line* terms, the record clearly shows that the past-season vendors' affiliation with and allegiance to an unwanted union were "motivating factors" in the Respondent's evident decision to bypass them when it came to filling bargaining unit jobs in the new, 1997–1998 season. And where the General Counsel made such a showing under *Wright Line,* the Respondent could escape 8(a)(3) liability only by coming forward with evidence "demonstrat[ing]" that it would have failed to hire the past-season vendors for these jobs even absent their protected affiliation with the Union.

How did the Respondent seek to satisfy this burden? It's not easy to identify in the Respondent's brief any systematic exposition of the point, because the Respondent spends most of its effort attacking the adequacy of the General Counsel's "prima facie" case under *Wright Line,* an issue I have already decided adverse to the Respondent. However, it appears that the Respondent would rely on a single factor—the past-season vendors' failure to affirmatively submit "applications" for such jobs, although "invited" by the Respondent to do so. The argument rests primarily on what attorney Jonas said in his October 23 letter to Arnolfo—that the Respondent "will, of course, consider applications from individuals who formerly worked at the Arena as vendors."

Perhaps it is merely ironic that, for *these* purposes, the Respondent would implicitly accord status to the Union as the exclusive representative of at least the past-season vendors, i.e., as the party through whom the invitation to "apply" could be constructively extended to *all* of the past-season vendors. Ironies aside, the invitation to "apply" occurred in the same letter in which the Respondent had refused to recognize or bargain with the Union as its vendors' exclusive representative. In short, if the Respondent expected the Union to pass on this invitation to the class of past-season vendors, it could have likewise expected the Union to transmit to them the Respondent's declared intention to run its new operation on a "nonunion" basis. And this latter message not only renders the invitation itself a hollow one, but itself would be unlawfully coercive if the Respondent had transmitted it directly to the employees.[45] Thus, I judge that the failure of past-season vendors to make "applications" under circumstances where the Respondent had already unlawfully refused to recognize or bargain with their

[45] *Kessel Food Markets,* 287 NLRB 426, 428–429 (1987), holding (in a successorship context) that "when an employer tells applicants that the company will be nonunion before it hires its employees, the employer indicates to applicants that it intends to discriminate . . . to ensure its nonunion status. Thus, such statements are coercive and violate Sec. 8(a)(1)." See also, e.g., *D & K Frozen Foods*, 293 NLRB 859, 873–874 (1989).

Union as their exclusive representative cannot sustain the Respondent's rebuttal burden under *Wright Line.*

Therefore, I conclude as a matter of law that when the Respondent failed to recall past-season vendors for resumed bargaining unit work in the Oakland Arena in the 1997–1998 season, it independently violated Section 8(a)(3) of the Act, substantially as alleged in the complaint.

B. Who Were the Discriminatees?

The complaint names 12 persons as victims of the Respondent's unlawful discrimination, as follows:

Susan Sarantitis	Donald Gohlke
Dennis Danziger	Bob Jacobs
Frank Bookman	Matt Medrano
Tom Robertson	Monte Kessler
Ronald Fritz	George Hague
Lawrence Rose	Bill Fritz

As previously noted, vendors Danziger, Gohlke, and Jacobs were surely among the regular cadre of vendors who had worked season after season, including through the 1995–1996 season, the last, pre-hiatus season of Warriors play in the Oakland Arena. However, the General Counsel made no systematic attempt to establish the identities of other employees comprising this cadre, and the only evidence suggesting which individuals were employed as vendors during the 1995–1996 season is contained in Jacobs' testimony, naming nine vendors who attended a kickoff meeting conducted by Merchandise Manager Sweeney at the start of that season. Thus, Jacobs listed the attendees as follows:

> A. Myself, Dennis Danziger, Donald Gohlke, Susie Layman [elsewhere identified by Gohlke as going by the married name Sarantitis], Bill Fritz, George Hague, Larry Rose, maybe a Frank Brooklyn, and Matt Latrano.

Making allowances for possible mistranscriptions of the names uttered by Gohlke from the witness stand, I might find that "Frank Brooklyn" is the same person identified as "Frank Bookman" in the complaint, and likewise, that "Matt Latrano" is the person identified in the complaint as "Matt Medrano." Even by making such allowances, however, this would leave three persons named in the complaint as unaccounted-for in any way on the record—Tom Robertson, Ronald Fritz, and Monte Kessler. Beyond that, none of the persons named in the complaint other than Danziger, Gohlke, and Jacobs were shown to have worked through the end of the 1995–1996 season, and thus to have retained their status as employees who, under the historical arrangement, would be recalled for new-season work.

Accordingly, without regarding these defects in proof as fatal to a full remedy for the 8(a)(3) and (5) violations I have found herein, I must nevertheless find that the General Counsel established only that Danziger, Gohlke, and Jacobs were specific victims of the Respondent's discriminatory failure to recall past-season vendors, or of its unlawful unilateral change in failing to recall past-season vendors, and that the others named in the complaint were not shown to have such status. However, where the class of victims is an identifiable one (it is identified in my remedy discussion, next), and the identities of all members of that class are presumably discoverable through examination of employer records, or persons with firsthand knowledge, it is appropriate to leave to the compliance stage the determination as to which individuals may properly be treated as within the defined class of past-season vendors, and thus be eligible for reinstatement and backpay as provided below.

The Remedy; Definition of the Affected Class of Past-Season Vendors

Because the Respondent committed unfair labor practices, it must be ordered to cease and desist therefrom and to take affirmative actions designed to restore the status quo ante as nearly as possible, and to effectuate the purposes and policies of the Act. Because the Respondent unlawfully refused to recognize and bargain with the Union as the exclusive representative of vendors employed in the resumed vending operation in the Oakland Arena, and unlawfully implemented changes on a unilateral basis in the terms and conditions of bargaining unit employment in the resumed vending operation, my recommended order provides that the Respondent must immediately confer recognition on the Union as such exclusive representative, and, upon the Union's request, rescind all changes in terms and conditions of employment found to have been unlawfully implemented, restore the terms and conditions that were historically applied prior to the unlawful changes, and maintain those historical terms and conditions until the Respondent has bargained in good faith with the Union to agreement or impasse regarding any departures from those terms and conditions. Because the Respondent's unfair labor practices included its unlawful failure to offer employment to past-season vendors in its resumed vending operation in the Oakland Arena, my recommended Order further provides that the Respondent must immediately offer reinstatement to persons within the class of past-season vendors, as defined below, and pay them backpay, with interest, for any losses they may have suffered as a consequence of the Respondent's failure to hire them.[46] Because the Respondent's unlawful conduct further included the unilateral imposition of changes in the means of compensating the vendors it *did* hire for bargaining unit work in the resumed operation, my recommended Order further requires the Respondent to make such employees whole, with interest, for any losses they may have suffered as a consequence of the change in their compensation.

The affected class of past-season vendors for purposes of reinstatement and backpay is as follows:

[46] Backpay for purposes of the class of past-season vendors shall include all amounts necessary to make them whole for any loss of earnings or other benefits suffered as a consequence of the Respondent's failure to recall them and its unlawful implementation of unilateral changes. Backpay for past-season vendors shall be computed on a quarterly basis, starting from the date in 1997 when the Respondent first employed persons performing bargaining unit vendor work in the Respondent's resumed operation in the Oakland Arena to the date it properly offers reinstatement to the past-season vendors, less any net interim earnings, all as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950). Interest on all backpay amounts, including those owed to employees actually hired into bargaining unit positions, shall be computed in accordance with directions in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

All persons employed by the Respondent during the greater 1995–1996 NBA season (including during any preseason exhibition or postseason playoffs games) who worked in positions covered by the terms of the 1995–1996 collective-bargaining agreement between the Union and the Respondent; but excluding all persons whose employment in such positions terminated prior to the conclusion of the greater 1995–1996 NBA season.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[47]

ORDER

The Respondent, Golden State Warriors, Oakland, California, its officers, agents, successors, and assigns, shall, consistent with the remedy section of this decision

1. Cease and desist from

(a) Refusing to recognize and bargain collectively with Concession Vendors Union Local 468, a/w Graphic Communications International Union, AFL–CIO (the Union) as the exclusive representative of its employees working in the bargaining unit as described in the 1995–1996 agreement between the Respondent and the Union (the bargaining unit).

(b) Making unilateral changes from procedures established prior to 1997 for the recall and hiring of past-season vendors to work in bargaining unit positions, or for the compensation of employees working in bargaining unit positions.

(c) Discriminating against employees when it comes to their hire, tenure, or other terms and conditions of employment in the bargaining unit because they are members of the Union or because they worked in the bargaining unit in prior seasons.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately confer recognition on the Union as the exclusive collective-bargaining representative of employees working in the bargaining unit, and, on the Union's request, bargain in good faith with the Union concerning their terms and conditions of employment and, if an understanding is reached, embody it in a written, signed document.

(b) On the Union's request, immediately rescind all changes in terms and conditions of employment in the bargaining unit found to have been unlawfully implemented in or after October 1997, restore the terms and conditions that were historically applied prior to the unlawful changes, and maintain those historical terms and conditions until the Respondent has bargained in good faith with the Union to agreement or impasse regarding any departures therefrom.

(c) Within 14 days from the date of this order, offer full reinstatement to bargaining unit positions to employees within the defined class of past-season vendors, and make them whole by paying them backpay, with interest, for any losses they may have suffered as a consequence of the Respondent's unlawful failure to recall or hire them in or after October 1997.

(d) Make whole all employees employed in the bargaining unit in and after October 1997 by paying them backpay, with interest, for any losses they may have suffered as a consequence of the Respondent's unlawful unilateral change in their manner of compensation for performing bargaining unit work.

(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to ascertain the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facilities in the Oakland Coliseum Arena copies of the attached notice marked "Appendix."[48] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former bargaining unit employees employed by the Respondent at any time during or after the greater 1995–1996 NBA season.

(g) Within 21 days after service of this Order by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection

[47] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[48] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively with Concession Vendors Union Local 468 a/w Graphic Communications International Union, AFL–CIO (the Union) as the exclusive representative of our employees working in the bargaining unit as described in the 1995–1996 agreement between the Respondent and the Union (the bargaining unit).

WE WILL NOT make unilateral changes from procedures established prior to 1997 for the recall and hiring of past-season vendors to work in bargaining unit positions, or for the compensation of employees working in bargaining unit positions.

WE WILL NOT discriminate against employees when it comes to their hire, tenure, or other terms and conditions of employment in the bargaining unit because they are members of the Union or because they worked in the bargaining unit in prior seasons.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL immediately confer recognition on the Union as the exclusive collective-bargaining representative of employees working in the bargaining unit and, on the Union's request, bargain in good faith with the Union concerning their terms and conditions of employment and, if an understanding is reached, embody it in a written, signed document.

WE WILL, on the Union's request, immediately rescind all changes in terms and conditions of employment in the bargaining unit found to have been unlawfully implemented in or after October 1997, restore the terms and conditions that were historically applied prior to the unlawful changes, and maintain those historical terms and conditions until we have bargained in good faith with the Union to agreement or impasse regarding any departures therefrom.

WE WILL**,** within 14 days from the date of the Board's Order, offer full reinstatement to bargaining unit positions to employees within the class of "past-season vendors" defined in the Board's decision, and make them whole by paying them backpay, with interest, for any losses they may have suffered as a consequence of our failure to recall or hire them for bargaining unit positions available in or after October 1997.

WE WILL make whole all employees employed in the bargaining unit in and after October 1997 by paying them backpay, with interest, for any losses they may have suffered as a consequence of our October 1997 implementation of a change in their manner of compensation for performing bargaining unit work.

GOLDEN STATE WARRIORS